SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 45

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 47

RAILROAD COMMISSION OF TEXAS, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 48

SAVANNAH SUGAR REFINING CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED APRIL 14, 1950.

SUPREME COURT OF THE UNITED STATES

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[fols. 1-2] [Caption omitted]

[fol. 3] [File endorsement omitted]

[fol. 4] **IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

Civil Action No. 49C1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; The Baltimore and Ohio Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; Erie Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Kewaunee, Green Bay and Western Railroad Company; Litchfield and Madison Railway Company; Louisville and Nashville Railroad Company; Missouri-Kansas-Texas Railroad Company; Guy A. Thompson, Trustee, Missouri Pacific Railroad Company; New Orleans and Northeastern Railroad Company; The New York Central Railroad Company; The Pennsylvania Railroad Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Railway Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; and Wabash Railroad Company; on Behalf of Themselves and All Others Similarly Situated; Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant

COMPLAINT—Filed September 20, 1949

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division:

Now come plaintiffs and for their cause of action against the United States of America, defendant, respectfully show:

[fol. 5] I

Plaintiff The Alabama Great Southern Railroad Company is a railroad corporation organized and existing

under the laws of the State of Alabama; plaintiff The Atchison, Topeka and Santa Fe Railway Company is a railroad corporation organized and existing under the laws of the State of Kansas; plaintiff The Baltimore and Ohio Railroad Company is a railroad corporation organized and existing under the laws of the State of Maryland; plaintiff Chicago and North Western Railway Company is a railroad corporation organized and existing under the laws of the State of Wisconsin; plaintiff Chicago, Burlington & Quincy Railroad Company is a railroad corporation organized and existing under the laws of the State of Illinois; plaintiff Chicago, Indianapolis and Louisville Railway Company is a railroad corporation organized and existing under the laws of the State of Indiana; plaintiff, Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a railroad corporation organized and existing under the laws of the State of Wisconsin; plaintiff Chicago, Rock Island and Pacific Railroad Company is a railroad corporation organized and existing under the laws of the State of Delaware; plaintiff The Cincinnati, New Orleans and Texas Pacific Railway Company is a railroad corporation organized and existing under the laws of the State of Ohio; plaintiff Erie Railroad Company is a railroad corporation organized and existing under the laws of the State of New York; plaintiff Gulf, Mobile and Ohio Railroad Company is a railroad corporation organized and existing under the laws of the State of Mississippi; plaintiff Illinois Central Railroad [fol. 6] Company is a railroad corporation organized and existing under the laws of the State of Illinois; plaintiff The Kansas City Southern Railway Company is a railroad corporation organized and existing under the laws of the State of Missouri; plaintiff Kewaunee, Green Bay and Western Railroad Company is a railroad corporation organized and existing under the laws of the State of Wisconsin; plaintiff Litchfield and Madison Railway Company is a railroad corporation organized and existing under the laws of the State of Illinois; plaintiff Louisville and Nashville Railroad Company is a railroad corporation organized and existing under the laws of the State of Kentucky; plaintiff Missouri-Kansas-Texas Railroad Company is a railroad corporation organized and existing under the laws of the State of Missouri; plaintiff Guy A. Thompson is a resident of the State of Missouri and is the

duly appointed, qualified, and acting trustee of Missouri Pacific Railroad Company, a railroad corporation organized and existing under the laws of the State of Missouri; plaintiff New Orleans and Northeastern Railroad Company is a railroad corporation organized and existing under the laws of the States of Louisiana and Mississippi; plaintiff The New York Central Railroad Company is a railroad corporation organized and existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois; plaintiff The Pennsylvania Railroad Company is a railroad corporation organized and existing under the laws of the State of Pennsylvania; plaintiff St. Louis-San Francisco Railway Company is a railroad corporation organized and existing under the laws of the State of Missouri; plaintiff St. Louis Southwestern Railway Company is a railroad corporation organized and existing under the laws of the State of Missouri; plaintiff Southern Railway Company is a railroad [fol. 7] corporation organized and existing under the laws of the State of Virginia; plaintiff Texas and New Orleans Railroad Company is a railroad corporation organized and existing under the laws of the State of Texas; plaintiff The Texas and Pacific Railway Company is a railroad corporation organized and existing under the laws of the United States; and plaintiff Wabash Railroad Company is a railroad corporation organized and existing under the laws of the State of Ohio.

II

Defendant is the United States of America.

III

This is a suit to enjoin, set aside, annul, and suspend a certain order of the Interstate Commerce Commission (hereinafter called the Commission) made and entered June 13, 1949, in a proceeding instituted by the Commission entitled, *Rail and Barge Joint Rates*, No. 26712 on the Commission's docket. A copy of the order is attached hereto as Exhibit 1 and made a part hereof. A copy of the Commission's report of July 7, 1948, made and entered in the same proceeding, and a copy of its supplemental report of June 13, 1949, which by the terms of the order were made a part thereof, are attached hereto as

Exhibits 2 and 3 and made a part hereof. The report of the Commission is reported at 270 I.C.C. 591. Its supplemental report is not yet reported.

IV

Plaintiffs are common carriers by railroad and, as such, are subject to the provisions of the Interstate Commerce Act, as amended, 49 U.S.C. § 1. Plaintiffs and other c
[fol. 8] mon carriers by railroad throughout the United States join with each other in publishing joint all-rail rates between various points in the United States. They are in competition with common carriers by water operating on the inland waterways of the United States. The order of the Commission here complained of requires plaintiffs and other common carriers by railroad similarly situated to join with certain of their competitors who are common carriers by water on the inland waterways of the United States in publishing joint rail-barge rates which are lower than the corresponding all rail rates between the same points. The effect of this order is to compel plaintiffs and other common carriers by railroad to give up to their competitors certain traffic which would normally move via all-rail routes in the absence of such lower or so-called differential joint rail-barge rates as the Commission has prescribed. The term "rail-barge rates" as used in this complaint includes rail-barge, barge-rail, and rail-barge-rail rates.

V

This suit is brought pursuant to the provisions of an Act of Congress approved June 25, 1948, 62 Stat. , 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, inclusive, and the jurisdiction of the Court rests upon these statutory provisions.

VI

Plaintiffs bring this action on behalf of themselves and all other common carriers by railroad similarly situated who are required by the order of the Commission (Exhibit 1 hereto) to enter into differential joint rail-barge rates. The said common carriers by railroad number approximately 3000, and it is, therefore, impracticable to bring them all before the Court. There is here presented a [fol. 9] common question of law affecting the several rights

of the said common carriers by railroad—whether the order of the Commission is based upon a valid exercise of the Commission's power—and a common relief is sought.

VII

By order entered October 8, 1934, a copy of which is attached hereto as Exhibit 4 and made a part hereof, the Commission, upon its own motion, instituted an investigation

> "• • • into and concerning the reasonableness and lawfulness otherwise of existing through routes and joint rates, rules, regulations, and practices for application by common carriers by railroad and by common carriers by water operating upon the Mississippi and Warrior Rivers and their tributaries; the reasonableness of existing minimum differentials between all-rail rates and corresponding rail-barge, barge-rail, and rail-barge-rail rates; the necessity, if any, for the establishment by the aforesaid common carriers by railroad and by water of additional through routes and joint rates, rules, regulations, and practices; and the fixing of reasonable minimum differentials if any, between the corresponding all-rail rates and any such additional through routes and joint rates; with the view to making such findings in the premises and prescribing such just, reasonable, and otherwise lawful joint rates, rules, regulations, and practices and such reasonable minimum differentials, if any, as the facts and circumstances shall appear to require."

This investigation proceeding was entitled *Rail and Barge Joint Rates*, Docket No. 26712. All common carriers by [fol. 10] railroad and by water participating in the joint rates referred to in the order were made respondents to the proceeding, but the respondents were not specifically named in the order instituting the investigation. This order was served as a general order upon all of the railroads of the country. Certain other proceedings, listed in a footnote on page 591 of the Commission's report (Exhibit 2), involving the same general questions relating to the lawfulness of differential joint rail-barge rates were consolidated for disposition with the general investigation.

VIII

Numerous and extensive hearings were held by the Commission, briefs were filed by the parties, an Examiner's proposed report was issued, exceptions to the proposed report and replies to exceptions were filed by the parties and oral argument was had before the Commission. Under date of July 7, 1948, the Commission issued its report (Exhibit 2), at page 619 of which the Commission made the following findings:

"1. We find that the amounts shown in appendix A and appendix B are justified as reasonable differentials to be deducted from the present first-class all-rail rates to and from the key points therein named to determine joint first-class rates applicable to the transportation of property by the barge lines and railroad carriers which are respondents in this proceeding, and that joint rates on other classes and columns should be determined by application of the usual percentages to such joint first-class rates.

"2. We find that joint commodity rates (not including commodities in bulk) from and to points referred to in appendix A and appendix B over lines of the aforesaid respondents should be established [fol. 11] in amounts which would bear the same ratio to the all-rail commodity rates from and to the same points as that between the first-class all-rail rates and the first-class barge-and-rail rates from and to the same points, and that the differences between the all-rail and barge-and-rail commodity rates so established would be justified as differentials; provided, however, that this finding shall not affect the present barge-and-rail rates on sugar, in carloads, and shall not require the establishment of barge-and-rail commodity rate from New Orleans to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such destination from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans.

"3. We find that the establishment of through routes and joint rates for the transportation of property subject to the differentials prescribed in findings 1 and 2 is necessary and desirable in the public interest.

"4. We find that as a reasonable condition under which such through routes shall be operated, the barge-and-rail traffic over such routes shall be subject to the same transit arrangements as those which are available under the corresponding all-rail rates from and to the same points."

The Commission did not enter an order at the time of the issuance of its report but requested respondents to notify the Commission whether they would establish routes and rates in substantial compliance with the findings in the report.

[fol. 12]

IX

Having been notified by the Rail Respondents that they had not found it possible to enter into joint routes and rates in substantial compliance with the findings in the Commission's report, the Commission issued its supplemental report of June 13, 1949 (Exhibit 3), and entered its order of June 13, 1949 (Exhibit 1). The supplemental report of the Commission made certain minor changes in the appendix to its original report (Exhibit 2), and changed the proviso at the end of finding 2 of its original report to apply on traffic to Galveston, Houston, and New Orleans as well as on traffic from those points, the failure to include southbound traffic originally having been due apparently to oversight. The ordering part of the Commission's order (Exhibit 1) reads as follows:

"*It is ordered*, That the respondents hereinabove referred to according as they participate in the transportation be, and they are hereby, notified and required on or before November 1, 1949, to establish the through routes for the transportation of property prescribed in the said reports;

"*It is further ordered*, That the said respondents be, and they are hereby, notified and required to establish, on or before November 1, 1949, upon notice to this Commission and to the general public by not

less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of property over the through routes referred to in the next preceding paragraph the joint rates prescribed in the said reports based upon the differentials found in the said reports to be justified. [fol. 13] *"And it is further ordered,* That this order shall continue in effect until the further order of the Commission."

X

During the course of the hearings before the Commission, there were received in evidence testimony of and exhibits prepared by various witnesss for both the rail carrier and barge carrier respondents pertaining to the comparative cost of transporting traffic via the competitive all-rail and barge-rail routes. All of the evidence bearing on the relative cost of service was referred for study to the cost section of the Commission's Bureau of Transport Economics and Statistics, and at one of the hearings before an Examiner of the Commission a restatement and summary of rail and barge cost data with supporting details was introduced in evidence by members of the staff of the Commission's cost section, who reached the general conclusion, quoted by the Commission at page 604 of its report (Exhibit 2), that

"* * * the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic."

Upon consideration of all the cost evidence before it, the Commission, at page 606 of its report (Exhibit 2), found:

"In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials."

[fol. 14]

XI

The Commission's order (Exhibit 1) is unlawful, beyond the statutory power of the Commission and beyond the power which it could exercise in accordance with the Constitution of the United States, based upon erroneous conclusions of law, without support in necessary findings of fact, contrary to and without support in the evidence, arbitrary, and capricious.

XII

It appears upon the face of the original and supplemental reports that the Commission has misconstrued the Interstate Commerce Act, as amended by the Transportation Act of 1940, and that the Commission's order rests upon and is vitiated by its misconstruction of the law.

The Transportation Act of 1940, 54 Stat. 898, among other things, amended the Interstate Commerce Act by adding an introductory provision entitled, "National Transportation Policy" and also by adding to the act a Part III for the regulation of water carriers in interstate and foreign commerce.

The National Transportation Policy reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of rea-
> [fol. 15] sonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the pro-

visions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 307(d) of the Interstate Commerce Act, 49 U. S. C. § 907(d), which was added to the Interstate Commerce Act by the Transportation Act of 1940 and upon which the Commission's power to prescribe differentials rests, reads in part as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Com- [fol. 16] mission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint in connection with such common carrier by water."

It appears on the face of the report of the Commission (Exhibit 2) and particularly from the discussion on pages 609-613 of the report headed, "THE JUSTIFICATION FOR DIFFERENTIALS—*Congressional Policy*," that the Commission has construed section 307(d) of the Interstate Commerce Act as a congressional mandate to prescribe differentials in favor of the rail-barge routes regardless of whether or not there is any economy in the barge service and regardless of any other transportation circumstances or conditions. It also appears from the report that the Commission's prescription of differentials in favor of the rail-barge routes is based solely upon this supposed congressional mandate. On page 613 of its report, the Commission says:

> "Viewing the facts before us in the light of the clear congressional policy with respect to water trans-

portation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified.''

Considered in the light of the National Transportation Policy, it is clear that Congress did not intend by section 307(d) of the Interstate Commerce Act to give an arbitrary preference in rates to one mode of transportation over another or to give any unfair competitive advantage to one carrier over another but only intended that there should be such ''reasonable'' differentials in favor of joint rail-barge routes as could be ''justified'' by the [fol. 17] economy of the barge service or other transportation circumstances or conditions.

By reason of the fact that the order of the Commission is based upon such a misconstruction of the law, it is beyond the authority of the Commission, unlawful, and void.

XIII

In the face of the Commission's own finding that differentials in favor of rail-barge routes are not justified by demonstrable economies in the rail-barge service, the prescription of such differentials, based upon a misconstruction of the Interstate Commerce Act, is unlawful, beyond the power of the Commission, arbitrary, and capricious. Since it arbitrarily and without foundation in law deprives plaintiffs of their right to compete for traffic on equal terms with their higher-cost competitors, it deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

XIV

The prescription of differentials in favor of joint rail-barge routes which are not justified by demonstrable economies in the rail-barge service is contrary to the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each, in that it deprives plaintiffs of their inherent advantage of lower cost of service. The prescrip-

tion of arbitrary differentials in favor of an inferior service having a higher cost will not promote adequate, economical, and efficient service and foster sound econ-
[fol. 18] omic conditions in transportation and among the several carriers but will have just the opposite effect and will result in unfair and destructive competitive practices, all in violation of the National Transportation Policy.

XV

The prescription of differentials in favor of joint rail-barge routes which are not justified by demonstrable economies in rail-barge service results in a relationship between all-rail and rail-barge rates which is arbitrary, without any rational basis in fact, and unreasonable in violation of section 1 of the Interstate Commerce Act.

XVI

The prescription of differentials in favor of joint rail-barge routes which are not justified by demonstrable economies in the rail-barge service gives to shippers who are in a position to ship via the rail-barge routes, an arbitrary and unfair competitive advantage in reaching competitive markets over other shippers who are not in a position to use rail-barge service but who do have available all-rail routes over which the traffic can be moved at a lesser cost than over the competing rail-barge routes. Thus, shippers who have available to them the lower-cost all-rail routes are deprived of this inherent advantage by the arbitrary rate differential imposed on them by the Commission. Such action by the Commission is unlawful in that it subjects all-rail shippers to undue and unreasonable prejudice and disadvantage and gives to rail-barge shippers an undue and unreasonable preference and advantage in violation of section 3(1) of the Interstate Commerce Act.

[fol. 19] XVII

In Appendices A and B to its report (Exhibit 2), the Commission prescribed a large number of specific differentials to be deducted from the all-rail rates to determine the joint rail-barge rates, but the Commission did not at any place in its report explain how such differentials were determined or upon what basis they rest,

nor did the Commission make any preliminary findings to support the prescription of such differentials. The action of the Commission in prescribing differentials without disclosing the basis on which they were made and without support of any preliminary findings is arbitrary and capricious and is beyond the power of the Commission, unlawful, and void.

XVIII

The Commission erred, misconstrued the law, and acted arbitrarily, capriciously, unlawfully, and contrary to and without support in the evidence and without support in necessary preliminary findings in making its ultimate findings set forth on page 619 of its report, (Exhibit 2) and quoted in paragraph VIII of this complaint.

XIX.

By reason of the arbitrary and capricious action of the Commission in entering its order of June 13, 1949, plaintiffs are left without an adequate remedy at law and will be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

Wherefore, plaintiffs pray:

(1) That, pursuant to the statutes referred to in paragraph V hereof, there shall be constituted to hear this [fol. 20] case a special court of three judges, one of whom shall be a Circuit Judge;

(2) That process issue against defendant, United States of America;

(3) That, after not less than five days' notice to the Attorney General of the United States, the United States Attorney, and such other persons as may be defendants, the Court, after hearing, by interlocutory injunction, enjoin and restrain enforcement of the order of the Commission (Exhibit 1) pending final hearing and determination of this suit.

(4) That the Court, pending hearing and determination of plaintiffs' application for an interlocutory injunction, by order, temporarily restrain enforcement of the order of the Commission (Exhibit 1).

(5) That, upon final hearing of this cause, the Court adjudge that the order of the Interstate Commerce Com-

mission (Exhibit 1) is predicated upon a misconstruction of the Interstate Commerce Act, unlawful, beyond the power of the Commission, arbitrary, capricious, unsupported by essential findings, and contrary to and without support in the evidence; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation, and execution of said order; and that plaintiffs and all other common carriers by railroad [fols. 21] similarly situated may have such other and further relief as may be deemed proper by the Court.

Respectfully submitted,

Robert H. Bierma, Harry E. Boe, Charles Clark, Frank H. Cole, Jr., L. P. Day, James A. Gillen, Roland J. Lehman, Y. D. Lott, Jr., John E. McCullough, Toll R. Ware, Harold E. Spencer, Attorneys for Plaintiffs, 135 East Eleventh Place, Chicago 5, Illinois.

Notices and other documents served on plaintiffs should be served on Harold E. Spencer, 135 East Eleventh Place, Chicago 5, Illinois.

[fols. 22-23] EXHIBIT No. 1

Order of the Commission Dated June 13, 1949, in Rail and Barge Joint Rates,

Docket No. 26712

[fol. 24] EXHIBIT No. 1 TO COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of June A. D. 1949.

No. 26712

Rail and Barge Joint Rates

The Commission having on October 8, 1934, entered its order of investigation in the above-entitled proceeding into and concerning the reasonableness and lawful-

ness otherwise of existing through routes and joint rates for application by common carriers by railroad and common carriers by water operating upon the Mississippi and Warrior rivers, their tributaries, and connecting waterways, which were made respondents to the said proceeding and the necessity, if any, for the establishment of additional through routes and joint rates, and the fixing of reasonable differentials between the corresponding all-rail rates and the joint rates in connection with the water-carrier respondents; and full investigation of the matters and things involved having been made; and the Commission having on July 7, 1948, made and entered its report herein and on the date hereof its supplemental report, which said reports are hereby referred to and made parts hereof:

It is ordered, That the respondents hereinabove referred to according as they participate in the transportation be, and they are hereby, notified and required on or before [fol. 25] November 1, 1949, to establish the through routes for the transportation of property prescribed in the said reports;

It is further ordered, That the said respondents be, and they are hereby, notified and required to establish, on or before November 1, 1949, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of property over the through routes referred to in the next preceding paragraph the joint rates prescribed in the said reports based upon the differentials found in the said reports to be justified.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

By the Commission.

W. P. Bartel, Secretary. (Seal)

[fols. 26-27] EXHIBIT No. 2

Report of the Commission Dated July 7, 1948

in

RAIL AND BARGE JOINT RATES,

Docket No. 26712

[fol. 28] EXHIBIT No. 2 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 26712

RAIL AND BARGE JOINT RATES [1]

Submitted March 11, 1948. Decided July 7, 1948

Upon investigation of the lawfulness of through routes and joint rates of common carriers by railroad and common carriers by water on the Mississippi and Warrior Rivers and their tributaries:

1. Through routes and joint rates for barge-and-rail transportation of property found to be necessary and desirable in the public interest.

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[1] This report also embraces No. 26679, Baltimore & Ohio Railroad Company et al. *v.* American Barge Line Company; No. 26680, Akron, Canton & Youngstown Railway Company et al. *v.* Inland Waterways Corporation; No. 26681, Alton Railroad Company et al. *v.* Mississippi Valley Barge Line Company; Investigation and Suspension Docket No. 4032, Cotton from Arkansas via Rail-Barge-Rail; Investigation and Suspension Docket No. 4060, Green Coffee from New Orleans, La., to Texas; Investigation and Suspension Docket No. 4082, Barge Line Traffic from and to the Southwest; and the following proceedings on further hearing: No. 13290, The Secretary of War, Operating Mississippi-Warrior Service *v.* Aberdeen & Rockfish Railroad Company et al.; No. 18406, Inland Waterways Corporation, Operating Mississippi-Warrior Service *v.* Beaumont, Sour Lake & Western Railway Company et al.; No. 19017, Inland Waterways Corporation *v.* Chicago Great Western Railroad Company et al.; and No. 19480, Inland Waterways Corporation, Operating Mississippi-Warrior Service et al. *v.* Alabama Great Southern Railroad Company et al.

2. Reasonable differentials between all-rail rates and joint barge-and-rail rates prescribed.

Nuel D. Belnap, Luther M. Walter, John S. Burchmore, Helen W. Munsert, and *Robert N. Burchmore* for Inland Waterways Corporation; *Harry C. Ames, Wilmer A. Hill,* and *Harry C. Ames, Jr.,* for Mississippi Valley Barge Line Company; *Wesley A. Rogers, Wilbur LaRoe, Jr., Frederick E. Brown,* and *Arthur L. Winn, Jr.,* for American Barge Line Company; water-carrier respondents.

Elmer A. Smith, Harold E. Spencer, Harry C. Barron, R. R. Bongartz, William C. Burger, E. D. Mohr, Leo P. Daly, Charles Clark, D. P. Connell, George F. Dyche, P. F. Gault, Walter McFarland, Toll R. Ware, A. H. Kiskaddon, B. F. Batts, J. N. Davis, A. S. Knowlton, R. J. Lehman, M. G. Roberts, C. H. Owen, F. J. Loughlin, H. R. Wilkinson, G. Wehnert, E. F. Stock, J. I. Bonner, E. Rigg, Harold Scherer, and *P. J. Shepherd* for rail-carrier respondents.

T. E. Wood for Arkansas Corporation Commission; *G. H. Shafer* for Illinois Commerce Commission; *Cornelius Lynde* for State of Illinois; *H. A. Hollopeter* for State of Indiana; *John C. DeMar, Ernest Porter, Harold E.* [fol. 29] *Davidson,* and *Walter Condren* for Iowa State Commerce Commission; *Homer Hoch, J. F. Stevick, John F. Jones, Curtis S. Hunter,* and *I. C. Peterson* for Kansas Corporation Commission; *C. C. Stanfill* and *J. E. Marks* for Kentucky Railroad Commission; *P. A. Frye* for Louisiana Public Service Commission; *A. L. Flinn* for Minnesota Railroad & Warehouse Commission; *V. E. Smart* for Missouri Public Service Commission; *C. A. Ross* for Nebraska State Railway Commission; *Elmer W. Cart, S. S. McDonald, Ben C. Larkin, James M. Hanley, John M. Agrey, Frank P. Aughnay, C. W. McDonnell,* and *J. C. Winter* for North Dakota Board of Railroad Commissioners; *C. B. Bee* for Oklahoma Corporation Commission; *William Williamson* for South Dakota Public Utilities Commission; *H. E. Ketner* for Virginia State Corporation Commission; *P. H. Porter, W. F. Ehman,* and *C. E. Schreiber* for Wisconsin Public Service Commission.

C. E. Childe and *Herman Mueller* for Mississippi Valley Association.

Gayle Aiken, Jr., J. R. Allen, V. Alexander, B. M. Angell, C. D. Arnold, H. M. Baker, Alonzo Bennett, I. G. Bentley,

R. A. Bentley, E. H. Berg, D. H. Berry, Stuart B. Bradley, J. G. Breslin, E. D. Brown, Frank Buck, E. C. Bundy, T. J. Bustard, Ed. P. Byars, A. J. Christiansen, R. G. Cobb, D. A. Cole, H. J. Conley, P. D. Cook, E. A. Cooke, A. M. Corp, S. G. Creswick, G. B. Cromwell, H. B. Cummins, W. B. Daly, F. J. Danner, L. F. Daspit, J. R. Davy, H. A. Deane, C. C. Dehne, M. G. deQuevedo, M. L. Dicherson, William A. Disque, David Dunn, W. M. Dyer, A. R. Ebi, D. E. Edison, R. P. Ellis, L. D. Estes, A. W. Evans, H. R. Faison, W. H. Fitzpatrick, S. P. Gaillard, Jr., H. W. Gehrke, Carl Giessow, L. J. Gorin, Harry Graham, M. A. Gray, H. M. Gregory, H. M. Hancock, Elisha Hanson, Charles M. Harrison, L. V. Hass, J. P. Haynes, C. O. Heinley, Samuel Herndon, C. R. Hillyer, Wade H. Hoffman, F. W. Hoffmokel, C. E. Holloman, H. J. Holsten, A. C. Hultgren, R. H. Judd, L. A. Keck, B. M. Keller, J. C. Keller, W. W. Klingensmith, E. E. Kohlwes, J. A. Kuhn, Leslie Lacroix, L. C. Landecker, E. F. Ledwidge, S. O. Lumpman, R. W. Marshall, M. W. Martin, C. E. Mayes, C. E. McDaniel, E. W. McKay, W. J. McMahon, W. C. McMurray, H. V. McNamara, H. S. McNeely, C. A. Mitchell, H. Morgenstern, J. C. Murray, P. J. Naughton, W. C. Newkirk, H. W. Nichols, G. L. Olsen, G. W. Orewiler, B. H. Overton, J. D. Patterson E. L. Peterson, W. C. Pike, J. W. Porter, R. D. Portwood, R. O. Powelson, E. A. Rainold, C. F. Real, A. L. Reed, P. M. Ripley, F. G. Robinson, F. L. Ruland, E. J. Schleeht, Louis A. Schwartz, A. H. Schwictert, L. F. Sherer, S. B. Short, A. H. Simpson, S. A. [fol. 30] *Simpson, A. T. Sindel, H. B. Skinner, E. H. Smith, J. W. Stanard, P. H. Stephens, R. A. Stiegler, R. C. Stoelting, H. F. Sundberg, C. A. Talley, J. H. Tedrow, F. L. Thomas, E. H. Thornton, F. B. Townsend, Paul Van Treese, H. J. Wagner, A. C. Wall, E. Wallace, W. N. Webb, D. F. Weil, W. J. Westerman, S. J. Wettrick, W. M. Wharton, I. W. Whitaker, C. E. Widell, Francis Williams, N. E. Williams, E. E. Williamson,* and *Fred Zimmerman* for other parties.

REPORT OF THE COMMISSION

MILLER, *Commissioner:*

Exceptions to the examiner's proposed report and replies to such exceptions were filed by the railroad and barge-line respondents and a number of other parties. We have

heard oral argument. Our conclusions are fundamentally the same as those proposed by the examiner but differ therefrom in certain details.

These proceedings comprehensively involve the lawfulness of the joint rates for barge-rail, rail-barge, and rail-barge-rail (collectively referred to as barge-and-rail) transportation of the Inland Waterways Corporation, operating the Federal Barge Lines, the Mississippi Valley Barge Line Company, and the American Barge Line Company,[2] which are the principal common carriers by water on the Mississippi and Warrior Rivers and their tributaries, and connecting railroad carriers.

The title case, No. 26712, is an investigation on our own initiative into—

> the reasonableness and lawfulness otherwise of existing through routes and joint rates, rules, regulations, and practices for application by common carriers by railroad and by common carriers by water operating upon the Mississippi and Warrior Rivers and their tributaries; the reasonableness of existing minimum [3] differentials between all-rail rates and corresponding rail-barge, barge-rail, and rail-barge-rail rates; the necessity, if any, for the establishment by the aforesaid common carriers by railroad and by water of additional through routes and joint rates, rules, regulations, and practices; and for the fixing of reasonable minimum differentials if any, between the corresponding all-rail rates and any such additional through routes and joint rates * * *

There were consolidated for hearing with No. 26712, three formal complaints filed by rail carriers under the Denison

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[2] These carriers are referred to in this report, respectively, as Federal, Valley, and American. Since these proceedings were started, other common carriers by water have established operations on these rivers, but they did not participate in the proceedings. The newer carriers have few joint rates with railroads.

[3] When this proceeding was instituted, we had no authority to prescribe minimum joint rates where one of the participants was a water carrier.

[fol. 31] Act,[4] assailing joint rates prescribed by us under that act in connection with Federal, Valley and American,[5] No. 26679, Baltimore & Ohio Railroad Com- *Valley, and American,[5] No. 26679, Baltimore & Ohio Railroad Com-* ton & Youngstown Railway Company et al. v. Inland Waterways Corporation; and No. 26681, Alton Railroad Company et al. *v.* Mississippi Valley Barge Line Company. Investigation and suspension Dockets Nos. 4032, 4060, and 4082, also assigned for consolidated hearing with the other proceedings are no longer of any practical importance. On petition of the rail carriers we reopened for further hearing Nos. 13290,[6] 19017,[7] 18406,[8] and 19480,[9] which arose on formal complaints filed by Federal and its predecessor, the War Department.

History and Description of Modern Barge Transportation on the Mississippi River System

Federal.—The revival of water transportation on the Mississippi and its tributaries (including the Warrior) dates from 1917, when freight movement on those streams had almost disappeared. Accepting the thesis of the pro-

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[4] Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended (49 Stat. L. 958), repealed as of October 1, 1940, by the Transportation Act of 1940.

[5] *Inland Waterways Corp. Through Routes and Rates,* 153 I. C. C. 129, 156 I. C. C. 141, 161 I. C. C. 207, 163 I. C. C. 716, 167 I. C. C. 385, 172 I. C. C. 525, 192 I. C. C. 173, 192 I. C. C. 663; *Mississippi Valley Barge Line Co. Application,* 167 I. C. C. 41, 171 I. C. C. 37, 178 I. C. C. 224, 182 I. C. C. 512, 183 I. C. C. 503, 192 I. C. C. 173; *American Barge Line Co. Application,* 182 I. C. C. 521, 185 I. C. C. 483, 190 I. C. C. 177, 192 I. C. C. 173.

[6] *United States War Dept.* v. *Abilene & S. Ry. Co.,* 77 I. C. C. 517, 92 I. C. C. 528.

[7] *Inland Waterways Corp.* v. *Chicago, G. W. R. Co.,* 129 I. C. C. 521.

[8] *Inland Waterways Corp.* v. *Beaumont, S. L. & W. Ry. Co.,* 142 I. C. C. 9.

[9] *Inland Waterways Corp.* v. *Alabama G. S. R. Co.,* 151 I. C. C. 126.

ponents of water transportation in the Mississippi Valley that only through greater use of the rivers could the wartime traffic due to World War I be handled, Congress in the Federal Control Act of March 21, 1918, directed the Railroad Administration to establish water transportation on certain inland waterways, including the Mississippi and the Warrior Rivers. Service on these rivers was not begun until the latter part of 1918. Because of poor equipment and other difficulties the brief experiment with barge transportation as a war measure was inconclusive. In the Transportation Act of 1920 Congress provided for the continued operation of the Mississippi-Warrior service, as it was then called, by the War Department. In 1924 the enterprise was acquired by the Inland Waterways Corporation, created by act of Congress, of which the Secretary of War was the sole incorporator. The corporation was transferred to the Department of Commerce July 1, 1939, and has since been supervised by that Department.

Federal's first operations were between St. Louis, Mo., and New Orleans, La., on the Mississippi, and between New Orleans and a point now known as Port Birmingham, Ala., [fol. 32] by way of Lake Pontchartrain, Mississippi Sound, and the Black Warrior, Warrior, and Tombigbee Rivers (commonly referred to collectively as the Warrior). In 1927 Federal began operations between St. Louis and St. Paul, Minn. Four years later it started service on the Illinois River to Peoria, Ill., extended in 1933 to Chicago, Ill., over the Illinois Waterway. Federal's operations on the Missouri River date from 1935. Its operations were extended to Omaha, Nebr., in 1947.[10]

On December 31, 1947, Federal had 21 steel, twin-screw towboats with indicated horsepower ranging from 800 to 2,400 each. It had 208 steel dry-cargo barges, having unit capacities from 500 to 3,000 tons, which it used on the Mississippi system, and 52 such barges of 500 tons' capacity each in the use on the Warrior. In addition, it owned 12 oil-cargo barges with capacities from 500 to 1,900 tons.

In 1947 Federal had semiweekly service between St. Louis and New Orleans, weekly service between St. Louis and

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[10] Inland Waterways Corp. Extension of Operations—Omaha, 265 I. C. C. 207.

Chicago, the Twin Cities, and Omaha, and between New Orleans and Mobile, and semimonthly service between Mobile and Port Birmingham. Service on the upper Mississippi and the Missouri was suspended during the winter. Federal discontinued its observance of regularly scheduled sailing dates in 1947. Intermediate ports principally served are Baton Rouge, La., Vicksburg, Miss.. Helena, Ark., Memphis, Tenn., and Cairo, Ill., on the lower Mississippi section, Rock Island, Ill., Burlington, Clinton, and Dubuque, Iowa, on the upper Mississippi section, and Peoria on the Illinois River section.

Federal's tonnage per year increased gradually from a figure of 672,111 tons in 1921 to 2,767,210 tons in 1938, the largest volume it has ever handled. The average per year for the period from 1921 to 1930, inclusive, was 1,246,440 tons. For the period from 1931 to 1940, inclusive, the average was 1,886,275 tons per year. In the war period, 1941 to 1945, the average was 2,299,052 tons. There was a recession to 1,648,458 tons in 1946, but in 1947 Federal carried 2,154,412 tons.

The ratio of traffic handled in connection with rail carriers to the total of Federal's traffic has shown a general declining trend in the past 18 years. In 1930 the joint traffic was 68 percent of the total, and in 1947 it was 17 percent. In the 5 years immediately prior to the war, Federal interchanged about 1,000,000 tons of traffic per year with the railroads, but the figure for 1947 was 369,217 tons.

Federal's earnings have fluctuated widely from year to year, ranging from operating income of $939,361 in 1938 to an operating deficit of $2,666,240 in 1946. For the 23 years from 1925 to 1947, inclusive, in which the [fol. 33] Inland Waterways Corporation has been in existence, its aggregate net deficit from water-line operations was $5,575,905, an average of $242,431 per year. Its general balance sheet for 1947 showed an earned deficit of $9,467,706.

Federal's traffic has consisted chiefly of wheat, corn, rice, flour, cotton linters, vegetable cake and meal, coffee, bituminous coal, ore, sulphur, sugar, iron and steel, fertilizers, canned goods, and soap. Since 1938 there has been a notable increase in Federal's tonnage of bulk commodities, which in recent years have averaged about 70 percent of the total (chiefly grain, coal, and sulphur). During the war it carried a large volume of crude and refined petroleum.

Valley.—Incorporated in 1929 by a group of St. Louis business men, who had sought unsuccessfully to negotiate with the Government for the purchase of Federal, Valley began operation in 1930. The initial investment in this line was $3,500,000.

Originally Valley's operation was between Cincinnati, Ohio, where it invested about half a million dollars in a terminal, and New Orleans, as well as intermediate ports. In 1932 it extended its service to St. Louis. Since 1941 it has operated to and from Pittsburgh, Pa., as well as on the Monongahela River, through its affiliations with the Campbell Transportation Company, with which it has since been merged.[11]

Valley owns 8 towboats with horsepower ranging from 760 to 2,000 each, 78 steel cargo barges having an average capacity of 612 gross tons each, 51 hopper barges, and 40 tank barges. Valley's traffic has grown steadily, except for temporary recessions in 1940 and 1942, reaching a total of 2,076,470 tons in 1947. In its earlier period it was almost wholly a carrier of package freight, much of which was interchanged with railroads, its joint rail-barge traffic in 1941 having been more than 55 percent of its total tonnage. In the following year Valley began carrying petroleum and its products, which together with other bulk freight constituted 76 percent of its total volume in 1947. In that year its joint rail-barge traffic was less than 2 percent of its total.

Valley has been financially profitable. It has paid dividends ever since 1936 with the exception of 1942, the total amount of these to January 2, 1948, being $1,876,000.

American.—This carrier, incorporated in 1927, succeeded two others which had been in operation for some time prior thereto principally on the lower Mississippi and the Ohio Rivers. It owns 13 towboats with an average horsepower of approximately 1,500 each and 198 barges, [fol. 34] having an average carrying capacity of 834 gross tons each. It has terminal facilities at Glassport, Pa., Pittsburgh, Louisville, Ky., Memphis, New Orleans, and St. Louis.

In 1947 American had 54 sailing south-bound and 82 sail-

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[11] *Mississippi Valley Barge Line Co. Merger*, 265 I. C. C. 53.

ings north-bound between Pittsburgh and New Orleans. It also operated irregularly on waterways other than the Mississippi and Ohio Rivers.

Between 1933 and 1941 American enjoyed a more rapid growth in its traffic than the other two barge lines before discussed. It also has the best record of earnings. A considerable part of its traffic consists of bulk and other heavy-loading commodities, including coal, coke, sulphur, petroleum products, iron and steel articles, and scrap iron, which in 1947 constituted 85 percent of its total tonnage. It has handled an insignificant amount of barge-and-rail traffic, the largest quantity in any single year being about 23,000 tons in 1943. In 1947 it carried 3,084 tons of such traffic out of a total of 1,385,666 tons.

The Present Structure of Joint Rates [12]

When the Director General of Railroads started the Federal operation in 1918, he assumed that, if the barge service were to be attractive to shippers, the rates would have to be differentially lower than the all-rail rates between the same points, but he had few precedents or other data to guide him in determining the amount of the differential. He made the port-to-port rates 80 percent of the all-rail rates between the ports, this percentage having been suggested by the fact that the Kansas City Missouri River Navigation Company, which operated a barge line between Kansas City, Mo., and St. Louis from 1911 to 1918, made its rates between those points by use of this percentage.[13]

To prevent opposition to barge transportation on the part of commercial interests in the interior, it was considered necessary to publish joint rates with the rail carriers to and from inland points differentially lower than the all-rail rates, and the differential selected for this purpose was 20 percent of the all-rail rate between the ports, the same as the differential reflected in the barge line's port-to-port

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[12] Barge-rail and rail-barge rates will hereinafter be referred to as two-way rates, and rail-barge-rail rates as three-way rates.

[13] See *Kansas City Missouri River Nav. Co.* v. *Chesapeake & O. Ry. Co.*, 34 I. C. C. 67.

rates.[14] This method of making joint rates set a pattern which in a general way has prevailed ever since. Between June 1919 and February 29, 1920, the Director General [fol. 35] established a limited number of two-way rates[15] but practically no three-way rates.

After Federal passed to the control of the War Department in 1920, it sought to persuade connecting railroads to broaden the joint-rate structure but was unsuccessful. Thereupon it filed its complaint in No. 13290, which covered practically the entire country and asked for joint rates wherever there was an open through all-rail route made up in part of a rail line between ports served by Federal. In our decision on this complaint we observed that Federal had "attempted to lay upon us a wholly unreasonable burden," because admittedly many of the proposed routes could not justly be required. The evidence was considered not sufficient to support the exercise of good judgment in determining those which should be required. We accordingly confined our findings to a statement of general principles offered for guidance of the parties in further negotiations, expressing doubt whether any further three-way rates were in the public interest. We were not convinced that additional two-way rates "should be established where the degree of circuity would be excessive, nor where the barge line's share of the joint haul would be so short that interchange expense would offset the assumed lower cost of water transportation." On this point we said:

> Until the contrary is clearly shown, however, we are of the opinion that no rail-and-barge route should be established where the short-line rail distance via the port of interchange between the interior point and the port of origin or destination exceeds by more than one-third the short-line rail distance over the most

[14] For example, the all-rail first-class rate between St. Louis and New Orleans at that time was $1.125, and the barge rate was made 90 cents, or 22.5 cents lower. To arrive at the barge-rail first-class rate between Chicago and New Orleans, this amount was deducted from the first-class all-rail rate of $1.375, making the barge-rail rate $1.15.

[15] The two-way rates established at that time are described at 77 I. C. C. 317, 323-4.

> direct route, nor where the short-line rail distance between the interior point and the port of interchange exceeds two-thirds of the short-line rail distance between the interior point and the port of origin or destination. Inasmuch as this rule is arbitrary, it ought not to be too rigidly applied, in disregard of competitive or commercial conditions.

The report also included the following statement, which has a direct bearing on the questions presented in the present proceeding:

> [The record] further indicates, however, that if such additional routes are established it will probably be necessary for the barge-line management to modify in some respects its plan of differential joint rates. So long as the barge line bears the burden of the differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount; * * * But under the proposed plan, which makes the differential in all cases 20 percent of the all-rail port-to-port rates, the results would often be incongruous and in some cases in violation of the fourth section. Moreover, insufficient thought seems to have been given to the possible disruption of established rate relationships. Doubtless some disruption is unavoidable and justifiable, but our impression is that under the barge line's plan it occurs to a greater extent than can be success- [fol. 36] fully defended, particularly in the case of export and import rates, where ports have been equalized.

Federal acceded to our suggestion that it deal with the rail lines "in friendly conference and negotiation." In this way it was able to obtain a large number of new joint rates between 1923 and 1929. Although the negotiatory process of establishing joint rates was reasonably successful, it was regarded in some quarters as time consuming and expensive. Accordingly in 1928 Congress was urged to provide some method of overcoming the reluctance of hostile railroads to establish joint rates with barge lines other than by resort to complaint and hearing under the Interstate Commerce Act. Otherwise, it was represented,

private capitalists would never be willing to venture in water transportation on the rivers. In response to this appeal Congress enacted the act of May 29, 1928, commonly known as the Denison Act, which directed us to issue certificates of public convenience and necessity to common carriers by water on the Mississippi and Warrier Rivers and their tributaries as a prerequisite to requiring connecting carriers to join with such water carriers in through routes and joint rates. In the event of refusal by the connecting carriers, we were directed to require the establishment of through routes and joint rates and "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission." Under our interpretation, the act required that this be done without hearing, since the only hearing specified therein was one upon complaint of an interested carrier "concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act."

Immediately after the enactment of the Denison Act, Federal applied for a certificate and an order with the object of securing a great many additional joint rates.[16] In our report, the first to be issued under that act, we observed that in Federal's application "an effort has been made to confine the proposed rates to routes not grossly circuitous as compared with the direct routes and to routes over which the transportation by barge would constitute a substantial portion of the total transportation." We pointed out that "nevertheless a number of very circuitous routes are included in the proposals as well as a number of instances where the barge haul is relatively so short, as compared [fol. 37] with the total barge-rail or rail-barge-rail distance as to raise grave doubt whether the cost of transportation was not in fact greater over such route than over the direct all-rail route.[17] To prevent such wasteful transportation,

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[16] This proceeding will be referred to by its docket number, Ex Parte 96.

[17] 153 I. C. C. 129, 133.

our direction to connecting rail lines to join with Federal is through routes and joint rates was subject to the exception—

> that (a) no barge-rail route need be established where the short-line all-rail distance via the lines of the said rail carriers from point of origin to point of destination through the port of interchange with the barge line exceeds by more than 40 percent the shortest rail distance between such origin and destination; (b) no rail-barge-rail route need be established where the shortest all-rail distance from point of origin to point of destination through the ports of interchange with the barge line exceeds by more than 33⅓ percent the shortest all-rail distance between such origin and destination; (c) no barge-rail route need be established where the shortest all-rail idstance between the inland point of origin (or destination, as the case may be) and the port of interchange exceeds three-fourths of the shortest all-rail distance between point of origin and point of destination; (d) no rail-barge-rail route need be established where the sum of the shortest all-rail distanee from the point of origin to the port of interchange where the shipment is delivered to the barge line, plus the shortest all-rail distance from the port of interchange where the shipment is relinquished by the barge line to the point of destination exceeds two-thirds of the shortest all-rail distance between origin and destination.

Where this formula permitted the establishment of additional routes, we required that the rate reflect the 20-percent differential, which Federal had originally adopted, as before stated, subject to a condition that where the circuity in comparison with the shortest all-rail route and the excess "relative service" (measured by the ratio of rail haul under the joint rate to the shortest all-rail distance) exceeded certain limits the differential should be 10 percent of the all-rail port-to-port rate instead of 20.

Compliance with the order in Ex Parte 96 necessarily had to be through collective action on the part of the railroads, and thereafter Federal was unable to induce individual railroad companies to enter into voluntary joint rates with it. With respect to rates in connection with its

lines on the Warrior and lower Mississippi, Federal's existing routes were less restricted with respect to circuity and relative service than those conforming to the Ex Parte 96 formula. Hence that proceeding was helpful to Federal mainly in securing joint rates via ports on the upper Mississippi and Illinois Rivers. With minor exceptions it now has no voluntary two-way rates through ports north of St. Louis.

In general, the orders issued under the Denison Act on applications of Valley and American contained provisions [fol. 38] similar to those in Ex Parte 96. The railroads voluntarily published some rates in connection with Valley between St. Louis and Cairo, on the one hand, and southwestern territory on the other hand, similar to those applicable over Federal. American had a limited number of joint rates with rail carriers before it filed its application in 1931.

Present two-way rates.—Generally speaking, almost every point in the United States east of the Rocky Mountains now has some two-way rates available to it, but this statement should not be understood as implying that rates are in effect between all interior points and all river ports, nor even that any given barge port has rates to or from all interior points. The coverage is necessarily so complicated that it cannot be described briefly.

The principal barge port is New Orleans. Via other Mississippi River ports it has two-way rates to and from all of the territory between the Mississippi River and the Rocky Mountains with the exception of all but a small part of New Mexico and that part of Texas which is south of Nacogdoches and Sweetwater, to and from the region east of the Mississippi and north of the Ohio River except New England, and to and from points in southern territory west of a line connecting Louisville, Ky., and Mobile, Ala. To and from southern territory east of that line it has rates via Mobile and Port Birmingham. Via the Ohio River ports, Evansville, Ind., Louisville, Ky., Cincinnati, and Pittsburgh it has rates to and from part of Wisconsin and all of official territory except northern New England.

St. Louis (including East St. Louis, Ill.) has two-way rates to and from most of the southern territory (excluding North Carolina), Louisiana and the greater portions of Arkansas, Oklahoma, and Texas via lower Mississippi ports.

Via Peoria it has rates to and from northern Illinois, northern Indiana, most of lower Michigan, and Wisconsin. To and from Iowa, eastern Nebraska, southern Minnesota, and southeastern South Dakota, it has rates via Burlington and Dubuque, Iowa, and Rock Island, Ill., (referred to as the Iowa ports). To and from the remainder of South Dakota and Minnesota, North Dakota, northern Wisconsin, and upper Michigan, St. Louis has rates via the Twin Cities.

Cincinnati, an important barge port, has rates to and from most of southwestern territory, except a narrow strip of northern Oklahoma and points in Texas "differential" territory.

The foregoing is far from being a comprehensive outline of the present rate structure but will serve to illustrate its approximate extent. So far as class rates and most commodity rates are concerned, these two-way rates are based on the 20-percent differentials which were in effect prior to 1938.

[fol. 39] *Present three-way rates.*—Federal participates in three-way rates between points on some of the more important rail lines in Illinois, Indiana, Ohio, Iowa, and Minnesota, on the one hand, and the greater part of Arkansas, Louisiana, Texas, and Oklahoma, on the other hand, via St. Louis or Cairo as northern ports and Memphis, Vicksburg, Baton Rouge, or New Orleans as southern ports. Federal also has three-way rates between portions of Illinois, Missouri, and Kansas, on the one hand, and portions of Wisconsin, Iowa, Minnesota, and the Dakotas, on the other hand, via St. Louis and other upper Mississippi ports. It also has three-way rates between a considerable number of points in Illinois and a limited territory in Mississippi and Alabama via St. Louis or Cairo and Memphis.

Valley has three-way rates between central territory and the greater part of southwestern territory via Ohio River and lower Mississippi ports. It also has some three-way rates between the Southwest and western truck-line territory via St. Louis and lower river ports, the extent of which is not shown in the record. There are numerous points in each territory, however, which are excluded under the Ex Parte 96 formula.

There are some three-way rates in connection with American between eastern territory (Pennsylvania, New Jersey, New York, and southern New England) and southwestern

territory. In the case of New York City, for example, these rates apply only to and from a considerable part of Arkansas via Pittsburgh and Memphis and to and from southern Louisiana and a small part of southeastern Texas via Pittsburgh and New Orleans or Baton Rouge.

The Issues and Evidence

This litigation was precipitated by the three complaints filed by the railroads under the Denison Act attacking the reasonableness of rates and differentials fixed by us in compliance with that act. By those complaints the railroads assumed a murden of proof specifically laid upon complainants by that measure. In its inception, therefore, the general investigation in No. 26712 was ancillary in character. At the outset of the hearings, however, Federal and Valley, the two barge lines principally interested, made it clear that they would not assume a defensive position but on the contrary welcomed the opportunity afforded by the investigation to urge changes in the existing joint rates, which were unsatisfactory to them in many ways.

By the Transportation Act of 1940 the Denison Act was repealed and part III of the Interstate Commerce Act relating to the regulation of water carriers was enacted. [fol. 40] Section 307 (d) thereof, which defines our power and duty with respect to the establishment of through routes and joint rates between common carriers by railroad and common carriers by water, contains the following sentence, which according to general agreement of the parties is of crucial importance here:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

Although the railroads have denied the existence of a public interest which requires a continuance of joint rates with the barge lines, they have stated their willingness to participate in joint rates which would be no lower than the corresponding all-rail rates. They contend, however, that "no justification can be found for an order requiring the railroads to join in rail-barge rates which are less than the all-rail rates from and to the same points." In this

contention they are supported by certain shippers and commercial organizations which are not in a geographical position to utilize barge-and-rail transportation advantageously. The barge lines and their supporters urge that in general there is a continuing justification for the existing differential rates and a considerable number of additional ones.

Cost of service.—Approximately one-fourth of the record deals with cost of transportation service by rail and barge. At the outset of the hearings the railroads announced their intention of showing "that the cost of transporting freight by barge-and-rail routes is not less than the cost of transporting freight by the all-rail routes, that the fact of the matter is that the all-rail routes are far more economical than the barge-and-rail routes" contrary to the view theretofore widely held and frequently expressed that water transportation, including that performed by the barge lines, is inherently cheaper, as a general proposition, than rail transportation. Federal and Valley accepted the challenge in this assertion.

The railroads made two traffic studies, for which they estimated costs. One of these, referred to as the Lyrla study, pertained to 963 carloads containing a total of 24,959 tons interchanged between Federal and the Illinois Central Railroad Company in April, August, and November, 1936. No other rail or water carrier was involved in this traffic. The other study, known as the Vivian study, covered 777 carloads with a total loading of 18,907 tons. It included all traffic interchanged by the railroads with Federal and Valley in selected weeks from June to October 1933 and July to September 1933, 1 week being assigned to each port. This study included three-way as well as two-way traffic. Studies relating to costs were also submitted by the Louisville and [fol. 41] Nashville Railroad Company and the Southern Railway Company and some of its subsidiaries.

In 1932 prior to this proceeding Federal had begun an investigation of its costs embracing its traffic on the lower Mississippi from September 1932 to February 1933. It later extended its investigation to traffic in certain months of 1934 and 1935 on the upper Mississippi, the Illinois Waterway, and the Warrior division. Voluminous evidence of the facts disclosed by this investigation was included in Federal's presentation.

Valley's evidence included cost data for the years from 1931 through 1937 and a part of 1938. These related to

operating expenses, rents, and taxes. Vessel costs were developed in amounts per net ton-mile, terminal costs and absorptions in amounts per ton handled, and traffic, general, insurance, claim loss, and other overhead expense in amounts per ton carried.

All of the evidence bearing on cost of service was referred for study to our cost section which was at that time part of our Bureau of Transport Economics and Statistics, hereinafter referred to as the cost section. At a further hearing a "restatement and summary of rail and barge cost data" with supporting details was introduced in evidence by members of the staff of the cost section who reached the general conclusion—

> that the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic.

Testimony in the nature of comment on the restatement of the cost section was received from respondents, who also filed supplemental briefs setting forth their criticisms of the restatement and the supporting data. No useful purpose would be served by reviewing these criticisms with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail.

Some of the present conditions bearing on Federal's operating costs are described as follows in its latest report to the Secretary of Commerce for the fiscal year 1947:

> Most of the towboats in use were 25 years old, an age generally accepted as the end of service life. In addition these steam vessels were made obsolete by the development during the past 15 years of the supercharged Diesel and the Kort nozzle. Most of the barge capacity, including all of that used for the transportation of package freight, was over 20 years old, the age generally accepted as the end of service life of barges on the river. Maintenance on these barges was excessive, [fol. 42] and claims from water damage to cargo were

not only also excessive, but were alienating shippers. Because of high cost of operating these boats and barges and the inefficiency of the equipment ton-mile costs had risen faster than freight rates, and there appeared little chance of conducting the operations of the Corporation at a profit without very substantial rehabilitation of the line by the replacement of this old equipment with the newest, most modern, and efficient equipment available.

In testimony before a subcommittee of the committee on appropriations of the House of Representatives in April 1947, of which Federal asks us to take official notice, its president said:

> If merchandise traffic is to continue to move on the western rivers, ways must be found to circumvent the high cost of terminal handling. The problem is illustrated by the contrast between 1932 wharf laborer wages of 35 cents and productivity of 1.85 tons per man-hour and 1946 wages of 93 cents and 1.20 tons per man-hour. Under these conditions, package freight cannot be handled at a profit.
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> Present terminal equipment is old and inefficient. This fact coupled with rising labor costs since 1941 necessitates practically complete rehabilitation and replacement with modern machinery.
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> The corporation has not in recent years maintained the lead in developing the most efficient and economical floating equipment, nor has it made progress in developing terminal handling methods and equipment, both of which are necessary to a profitable handling of joint rail-barge and other merchandise traffic.

On the same occasion the Under Secretary of Commerce stated the view of that department that—

> it is a mistake to continue the operation of this corporation with equipment of the present nature and antiquity. . . . A decision to modernize will involve the expenditure of approximately $17,000,000 over a pe-

riod of about 3 years. This investment would involve developing terminal facilities which would reduce the high cost of transferring tonnage to and from land carriers and a type of vessel that will lower operating costs.

A start on this modernization of equipment and terminals was made in 1947, when Federal was authorized to spend about $2,250,000 for this purpose. Of this amount approximately $1,000,000 represents the cost of a new towboat of modern design and nine articulated barges, which will be operated as an integrated tow. This unit has recently been placed in experimental operation to determine its adaptability to service on various sections of the river with different types of cargo. Federal bases its hope of economical operation in the future on the success of the experimental integrated tow and of certain new terminal equipment and methods of terminal operation. By the latter it is hoped apparently to reduce stevedoring and cargo expenses, which on Federal's Mississippi system in the fiscal year 1947 [fol. 43] increased 48 percent over the similar item in the calendar year 1945, although the increase in freight operating revenue in the same period was only 2 percent. If the expected economies from these sources do not materialize, Federal concedes that its usefulness will be at an end. It apparently believes that its operations on the Warrior have already reached that point.

In his testimony before the subcommittee mentioned above, Federal's president stated that "many large operators, private, contract, and common carriers have better, more efficient fleets and provide faster and more dependable service than the Federal barge lines." He pointed out, however, that the private lines have also encountered the problem of rising terminal costs and do not want most types of merchandise freight because of the high cost of handling it under present terminal methods.

This development is illustrated by the experience of Valley, whose increasing proportion of bulk freight since 1941 has previously been mentioned. In that year it interchanged more than 325,000 tons of freight with railroads, but in 1947 its joint traffic was only 37,000 tons. This decline of 89 percent apparently was due in large part to embargoes placed against rail-barge traffic by Valley in order to avoid a serious loss of revenue owing to the ex-

pense of transferring freight between barges and railroad cars. Although it still has some hope of profitable participation in this joint traffic at a future time, the outlook is obscure.

In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials.

The shippers' interest in rail-barge transportation.—The sharp contraction of rail-barge traffic, which occurred during the war, weakens a contention often advanced in past years that joint rates on such traffic were needed in order to provide additional transportation facilities. At that time there was some fear that the railroads had reached the limit of their ability to supply the transportation required by an expanding economy, particularly in case of an abnormal wartime demand. This was the argument principally relied on in 1917 when it was represented that barge service was necessary to enable the Government to meet the transportation needs of World War I. As the service was begun too late to be of material military value in that war, the argument was not disproved by that experiment and was renewed in this proceeding. One of Federal's witnesses expressed the opinion that in 1937 the volume of traffic handled by the railroads represented about the maximum volume which they could handle with the serviceable [fol. 44] equipment of that year. Accordingly it was urged by Federal that there was an acute need of barge-and-rail transportation to carry out the defense program which was begun in 1939. The large increase in all-rail transportation which has since occurred, however, was accompanied by a contraction in barge-and-rail traffic. In 1947 the total joint traffic of the three barge lines which are respondents in this proceeding was only 30 percent of the corresponding total in 1939.

The interest in joint barge-and-rail transportation among shippers in the Mississippi Valley seems to relate not so much to an expansion in transportation facilities as to the influence of barge service on rates. To a considerable extent the revival of interest in river transportation in 1917 was an indirect result of the amendment of section 4 of the Interstate Commerce Act in 1910, which was a portent to some of the more important river cities that they would

eventually lose their depressed rail rates based on potential steamboat competition. In 1917 a project was launched by business men of New Orleans, St. Louis, and Memphis in the hope of securing lower rates either by rail or water. Those promoters in fact were the progenitors of Federal. Ten years later under somewhat similar circumstances barge transportation was extended to the upper Mississippi, although at the time Federal's officials apparently regarded the extension as inopportune.

Another significant development in 1917 was the organization of the Mississippi Valley Association, whose object was "to promote the economic welfare of the Mississippi Valley States and of the nation by developing the economic resources and promoting the commerce of the Mississippi Valley." The Association has taken an active part in this proceeding, voicing its opinion that there is an undesirable congestion of population in the States bordering on the "rockbound Atlantic Coast" and a vital need "to bring about a more even diffusion through the interior." This congestion of population is attributed to a high degree of concentration of manufacturing industries "along the deep-water rim of the United States" where they have the benefit of low-priced water transportation as well as rail transportation. The Association considers that there has been a failure of the Mississippi Valley to progress normally in population and industry because of high transportation costs. It says:

> This handicap can be removed in large degree through the development and use of inland water transportation. The extent to which these benefits can be spread throughout the interior will depend upon the extent to which favorable joint rates and service are established and maintained.

[fol. 45] A considerable number of commercial witnesses were presented by the Association. They included traffic officials of manufacturing concerns, officers of agricultural organizations and chambers of commerce, representatives of State commissions and others. These witnesses testified early in the hearings and described conditions as they were in 1937 and prior years.

At that time there was a growing south-bound barge movement of manufactured steel products, agricultural implements, tractors, automobile and truck parts, canned

goods, beer and other alcoholic beverages, and other miscellaneous commodities from the Middle West to the South for consumption in that territory, for export, or for transshipment by water to the Pacific coast. The south-bound barge movement of agricultural products consisted chiefly of wheat, corn, and tobacco. The volume of these was not large and fluctuated from year to year reflecting changes in the export demand for such agricultural commodities.

The north-bound barge movement on the Mississippi in that period greatly exceeded the south-bound, and generally this has always been true causing an unbalance in traffic which has been disadvantageous to the barge lines.[18] In 1937 and prior years the preponderance of north-bound tonnage was sugar, but there was also a considerable movement of sulphur, crushed oystershells, sisal, cotton linters, cottonseed meal and cake, coffee, rice, bags and bagging, pig iron, and canned goods. These commodities comprised about 45 percent of the total tonnage of both Federal and Valley in 1937.

There can be no doubt that most of the barge movement above referred to was due to the fact that the rates were lower than they would have been for all-rail shipments. Much evidence was presented by shippers to show that from the standpoint of service barge transportation is inferior to all-rail. The principal disadvantage is the longer time involved. Federal's schedule between New Orleans and St. Louis is 15 days north-bound and 7 days south-bound, contrasted with 2 days for rail shipments. The hazards of navigation often increase the transit time of barge shipments. Consequently when speed is essential, shippers must use rail transportation, as, for example, when it is imperative that a shipment of export freight arrived at a port before a certain sailing date of an ocean vessel. Transfer of shipments from barge to railroad car or vice versa increases freight damage. Fragile objects, such as chinaware and some kinds of furniture, are for that reason not [fol. 46] well adapted to barge transportation. In the ship-

[18] In 1938 Federal had an unusually heavy movement of export grain which made its south-bound tonnage larger than its north-bound. There was almost an equality of directional movement in 1939, but since that time its north-bound movement has been predominant. Valley seems to have had a more nearly balanced traffic than Federal.

ment of agricultural implements, for example, which formerly moved in some volume by barge, the handling between barge and car has caused marring of painted surfaces and disarrangement of packages, which make barge transportation less desirable for this traffic. In the case of some commodities, barge transportation to some extent is conducive to deterioration or shrinkage on account of the slow transit, infestation, or contamination through contact with other freight.

There is some evidence to the effect that the slowness of movement is unobjectionable or even desirable under certain circumstances, as when the freight is to be stored after its arrival, since the shipper is saved storage costs while the shipment is in transit. However, such circumstances appear to be exceptional.

An argument frequently advanced in favor of barge transportation in the Mississippi Valley has been based on the availability of coastwise and intercoastal steamship service to manufacturers and other shippers doing business on or near the seacoasts. A number of shipper witnesses testified in this proceeding that they had found barge rates and service advantageous to them in competing successfully with Eastern shippers who had the benefit of low ocean rates to Gulf and Pacific ports in effect prior to the recent war. The barge lines experienced some difficulty in keeping their rates on a competitive basis during that period, as the low ocean rates were responsible for a considerable movement of freight from central territory to the South and Southwest by rail to eastern ports and steamships beyond. This influence extended as far inland as Indiana, causing a series of what are described as rate wars between Valley and the ocean lines, which were curbed to some extent by the enactment of part III of the Interstate Commerce Act.

The shippers' evidence is chiefly of significance because it indicates a fairly unanimous view that the principal object in shipping by barge is to save transportation expense.

The Justification for Differentials

Congressional policy.—The views above summarized have exercised a potent influence on Congressional policy with respect to barge transportation in the Mississippi Valley. An outstanding example of this influence was the enactment of the Denison Act, and the following quotation

from the committee report on that measure to the House of Representatives is illuminating:

The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purpose for creat- [fol. 47] ing the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.

Paragraph (e) of the bill was carefully prepared to accomplish this purpose. If enacted into law, it is believed by the committee that it will immediately result in overcoming the reluctance of many of the railroads to cooperate with the Inland Waterways Corporation, and will aid in bringing about such through routes, joint rates, and fair division of joint rates as will afford to the people of a large part of the country the economies of cheaper transportation by water.

Although paragraph (e) referred to above has been repealed, there remains in effect section 3 (c) of the Inland Waterways Corporation Act, enacted at the same time, declaring it to be the policy of Congress to continue the transportation services of the corporation until among other conditions "there shall have been published and filed * * * such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers." In the light of legislative history the term "privileges of joint rail and water transportation" must be understood as referring to barge-and-rail rates lower than all-rail rates.[19] Such an interpretation receives support also from the fact that bills introduced dealing with the proposed sale of Federal to private parties all specify that the present joint rates with the railroads shall be continued.

In view of these expressions of congressional policy with

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[19] In its report on the Government Corporations Appropriation Bill, 1947, the House Committee on Appropriations stated: "In determining the value to the people of the operation of the barge lines consideration must be given to the effect on the rates of railroad transportation, the vast benefits of which cannot be estimated and which are not limited to the immediate areas of the rivers."

respect to barge transportation on the Mississippi river system, the interpretation of section 307 (d) urged upon us by the railroads and their supporters that the justification for differentials must rest upon proof of lower cost of barge-rail service seems much too narrow. That contention derives some dramatic force from the fact that in the past the proponents of barge transportation have strongly asserted a cost advantage on the part of the barge lines. Thus in *Inland Waterways Corp.* v. *Chicago G. W. R. Co.*, 129 I.C.C. 521, 525, we said:

The barge line asserts that the proposed rail-barge rates made differentially lower than the corresponding all-rail rates are justified by the fact that water transportation is generally less costly than rail transportation and also less desirable to the shipper. * * *. The principal witness for the barge line stated that the experience of eight years' operation "leads to the conclusion that well-equipped common carriers on such streams as the lower Mississippi River can be profitably operated at one-half the average cost of rail service in the United States," but gives no data to support this opinion.[20]

[fol. 48] This view is reflected in a number of our earlier reports dealing with the question of barge-rail differentials, in which we stressed lower cost of barge service as an important reason for such differentials, but in no instance did we decline to prescribe or approve differential rates because the economy thereof had not been affirmatively shown. Furthermore those decisions antedated the enactment of section 307 (d). Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is such an affirmative showing.

The railroad respondents argue that due regard for the national transportation policy set forth in the Interstate Commerce Act would preclude a finding that differential rates are justified for the reasons that by such a finding (1) the inherent advantage of all-rail transportation over barge-and-rail because of the lower relative all-rail cost would not be recognized and preserved, (2) sound economic

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[20] Federal adhered to the position that the prime reason for differentials is the lesser cost of operation by water than by rail as recently as 3 or 4 years ago, *Inland Waterways Corp.* v. *Southern Ry. Co.*, 263 I. C. C. 227, 234.

conditions in transportation and among the several carriers would not be fostered, and (3) undue preferences and advantages and unfair or destructive competitive practices would result. The respondents concede that at the time of the enactment of the Inland Waterways Corporation Act in 1924 and its amendment in 1928, Congress was motivated by a belief in the inherent cost advantage of barge transportation, which it continued to hold in 1940 when part III of the Interstate Commerce Act was passed. Urging that no such advantage exists today, so far as the facts before us show, the rail respondents contend that they should now be found to have an inherent advantage even though the necessary consequence of such a finding would be tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley.

The rail respondents further argue that the differential rates are economically unsound because they tend to divert traffic from all-rail routes over which it can be handled most advantageously and thus increase the economic burden on the transportation system as a whole. Shippers to whom the differential rates are available thus receive an undue preference not based on comparative transportation costs in competition with others not in a geographical position to use barge transportation, according to the contention of the railroads as well as shippers at Houston and Galveston, Tex., and Savannah, Ga., who believe that New Orleans shippers receive unfair advantages through the differential rates.

We are unable to accept this argument based on the national transportation policy. In the past several years Federal has received continuing consideration by congressional committees on appropriations as well as others. It definitely appears from that consideration that Federal is [fol. 49] deemed to be performing a pioneering function for the purpose among others of demonstrating the advantages of joint barge-and-rail transportation in the belief that such service eventually will prove to be economical.[21] It

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[21] In a report to the House Appropriations Committee by the House Small Business Committee, dated May 14, 1947,

is not for us to say that the experiment should now come to an end.

In our first report dealing with relations between Federal and the railroads 25 years ago (77 I. C. C. 317, 353) we said:

The Mississippi-Warrior service is owned and operated by the Government, as we understand the situation, not necessarily as a permanent governmental undertaking, but to test the possibilities of transportation by barge upon these great inland waterways. * * * Clearly everything that can be done ought to be done to give this experiment a fair opportunity to demonstrate its worth, and in this endeavor the project should be viewed in the light of the service which can reasonably be anticipated and without permitting vision to be obscured by the difficulties and embarrassments which surround every new enterprise and particularly one which has been compelled to start life with a heritage of wornout and inadequate facilities. On the other hand, it is equally clear that the experiment will not be

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relating to the Inland Waterways Corporation, the latter commit-ee said:

"It is apparent that the privately owned barge lines will not initiate service on the Missouri River. These operators are generally of the opinion that operations on the Missouri are unfeasible in view of the speed of the current, and the depth and instability of the channel.

"With the proposed new towing equipment, Federal Barge lines hopes to show privately owned barge lines that operations on the Missouri need not be unprofitable.

"Barge service is of great importance to the communities on the Missouri River. Rail transportation is costly from these interior points and it is difficult for them to compete with communities which are closer to their markets. The Panama Canal increased their competition by cutting transportation costs from the Pacific coast: Thus, their markets were further restricted. The railroads then, to compete with the Canal, initiated water-compelled rates from the west coast to Chicago so that it costs less to ship some commodities to and from Chicago from and to the west coast than it does in the case of certain mid-west communities.

"By lowering transportation costs, barge service will give this area access to new markets and sources of supply."

fairly conducted if the barge line is permitted to tap the resources of the rail lines by depriving them in any way of just compensation for the services which they perform in connection with its operation.

This statement is worth recalling here for two reasons: (1) Federal once more is struggling with worn-out and inadequate facilities, (2) the respondent barge lines reiterate their concurrence in the principle that railroads which are parties to joint barge-and-rail rates are entitled to revenues therefrom equivalent to what they would receive from corresponding all-rail rates. Accordingly, since the barge lines accept the burden of the differential without imposing it in whole or in part on the railroads, they urge that their views as to the measure of the differential are entitled to important weight, as we observed in our first report on this subject, previously quoted, 77 I. C. C. 317, 362. The requirement that the barge line absorb the differential in its [fol. 50] division of the joint rate in and of itself provides some measure of safeguard against the performance of uneconomical barge-and-rail service where the barge line is privately operated, as shown by Valley's recent embargoes of joint traffic interchanged with the railroads.

Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified.

The Joint-Rate Structure to be Prescribed

Controversy over the subject of joint barge-and-rail rates has perhaps tended to obscure the facts that from the standpoint of practicality the present structure of joint rates by and large is a fairly satisfactory product of an evolutionary process. Federal seems to concede this in the following statement in its brief:

> While some of the individual rates making up the whole of the rate structure may require revision in the interest of consistency and relative reasonableness, we have demonstrated * * * that the existing differential as a whole is reasonable and is in the public interest.

The following quotation from the same source summarizes Federal's criticisms of the present rates:

In the first place, some of the rates provided in the old voluntary adjustments are probably uneconomical, due to an excessive degree of circuity. Furthermore many of the rates provided by the Ex Parte 96 formula are wholly unsatisfactory because of the inconsistencies and maladjustments which result from the application of that formula.

Under present conditions it is not necessary or desirable to adhere rigidly to the Ex Parte 96 formula, which was originally devised when only Federal was in operation. As applied to the Ohio River lines, the formula produced some unsatisfactory port relations and other inconsistencies. There is no present need for relating the differential closely to the all-rail rate between ports of interchange. The circuity and relative-service restrictions in the formula are sound in principle, but in the past the railroads have insisted that they be applied with an inflexibility which was not intended and produced some incongruous results.

Comprehensive proposals for the establishment of differential rates were made by witnesses for Federal, Valley, and the Mississippi Valley Association. The latter's plan was submitted as "a suggestion and guide for a reasonable system of joint rates rather than as a final and inflexible proposal," and as such we have given it due consideration. The Association's plan was based on certain studies of barge [fol. 51] costs in 1936 and average all-rail rates in that year, from which it argued that "the average differential on two-way traffic should be approximately 25 percent of the total all-rail rate, origin to destination." The differentials proposed by the two barge lines are considerably less than that percentage, and in our opinion the joint rates suggested by the Association would be much too low to permit the barge lines to absorb the differentials without serious revenue effect, as apparently those lines themselves believe. For similar reasons we do not adopt the suggestion of the Association that there should be many more points of interchange with rail lines than those involved in the barge lines' proposals and that joint routes applicable over more than one barge line should be established.

Both Federal and Valley urge that no formula be prescribed as a means of accomplishing such revision of the

joint rates as may be required in this proceeding, basing their objection to a formula on the length of time which probably would be required for the computations as well as on the possibility of impractical and artificial results. The requirement of the Denison Act that rates be prescribed without a hearing made it practically necessary to employ a formula but there is no such necessity here. Since distance scales of joint barge-line rates having many of the aspects of a formula are not feasible, the only alternative is the prescription of individual rates. Because of the extensive territory involved, these must necessarily be confined to groups or key points. The proposals of both Federal and Valley have been constructed on that plan, made up of differentials to be deducted from the first-class all-rail rates between a considerable number of representative points east of the Rocky Mountains.

In arriving at their proposed differentials both Federal and Valley took a generally similar approach, which, as stated by Federal was to determine the "relative level of rates necessary to cover full costs, including a return on investment, for the barge portion of the through haul, and to provide for the rail portion of the through haul revenues as great as if the traffic were transported all rail." They employed different methods of making that determination, and each is complicated and difficult to describe. The computations involved theories and assumptions which necessarily are open to some of the criticism directed to them by the railroads. That criticism requires no extended discussion here, however, for to a considerable extent the proposed differentials rested on judgment as well as computations. In the majority of instances the differentials in the latest revised proposals of the barge lines are the same as those which were in effect in the early part of 1938 without taking account of the general increases in rates since that time.

[fol. 52] There are a number of differences between Federal's and Valley's proposals. For example, Federal proposes a differential of 33 cents in respect of the two-way first-class rate between Fargo, N. Dak., and New Orleans via St. Louis or Cairo, while Valley proposes 42 cents. Each has refrained from criticizing the other's proposal, leaving their differences of opinion for us to reconcile but agreeing that their competitive relation requires a common level of rates between the same or similarly situated points. This

necessity is illustrated by the two-way rates between New Orleans and Grand Rapids, Mich., the latter being approximately equidistant from the nearest barge ports of interchange, Peoria (298 miles) and Cincinnati (297 miles). The short-line rail and water distances from Peoria to New Orleans are 826 and 1,354 miles, respectively, and from Cincinnati to New Orleans 836 and 1,484 miles, respectively. From the standpoint of distance the routes via Cincinnati and Peoria therefore are substantially equal. Originally Federal proposed a differential of 46 cents first class via Peoria and Valley one of 49 cents via Cincinnati. Federal now proposes 42 cents (compared with 41 cents at present) and this differential appears to be satisfactory to Valley.

In weighing the merits of the two proposals we have given weight to the fact that Federal has been specifically charged by Congress with providing transportation of the largest possible variety of commodities over an extensive system of waterways on a structure of joint rates with railroads in the hope of demonstrating the economy of such combined service. The experiment is being conducted at public expense, and unless income and outgo are somewhere near balance there is little likelihood that private operators will ever enter the field either in competition with or in succession to Federal. Because of its experimental status Federal should not be compelled to accept a lower level of joint rates than it considers necessary in the absence of evidence that its proposed rates would be unreasonably high.

Federal's proposal is necessarily more comprehensive than Valley's in view of its broader operations. It bears evidence of careful preparation and is for the most part conservative with respect to the measure of the differentials. With a few exceptions the groupings appear to have been carefully worked out for the purpose of avoiding indefensible fourth-section departures and excessive circuity in deference to views which we have heretofore expressed on that phase of water-rail transportation. The most notable of these exceptions is due to a proposed extensive enlargement of that portion of the western territory now provided with differential rates to and from New Orleans via Vicksburg and Memphis. We have previously con- [fol. 53] sidered this territory in *Cotton and Cotton Linters From South and Southwest*, 183 I. C. C. 33, in which we declined to go beyond the Ex Parte 96 formula. The reasons

for that action, which was intended to prevent undue prejudice to Houston and Galveston, continue to be valid.

Certain characteristics of Valley's proposal should also be noticed. For obvious reasons this line sees no economy in joint barge-rail rates based on such short water movements as that between St. Louis and Cairo, for example. On the other hand, however, it has gone somewhat too far in the other direction by proposing routes intended to embrace a maximum water movement. In undertaking to draw traffic through Cincinnati fa-ther than Evansville from a considerable portion of Indiana it has aroused protest from Evansville which seems well-founded. This situation is illustrated by Valley's proposed three-way route from Lafayette, Ind., to Dallas, Tex., via Cincinnati and Baton Rouge. The corresponding all-rail route via these ports is 1,426 miles in length, 63 percent in excess of the short-line rail distance of 872 miles between Lafayette and Dallas. The all-rail distance via Evansville and Vicksburg is 1,073 miles, reflecting a circuity of only about 23 percent. The circuity in the route via Cincinnati and Baton Rouge is far greater than that permitted by the Ex Parte 96 formula.

In appendices A and B are shown differentials which we consider justified for application to first-class all-rail rates between a large number of key points. The key points are largely the same as those used by Federal and Valley.[22] We shall not define or limit the territorial grouping to be used in applying these differentials except in certain particular instances to prevent excessive circuity. The grouping proposed by Federal and Valley subject to the exceptions just mentioned appears to be satisfactory. With respect to points served by both barge lines Federal's proposed grouping may be used, as Valley agrees.

In the report proposed by the examiner, differentials for points in official territory were largely confined to rates via one port only. Accordingly differentials for Federal were

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[22] The key points are not intended as centers of rate groups but are used to designate zones in which common differentials are to apply in accordance with proposals of the barge lines. For example, in Federal's proposal Fargo, N. Dak., represents a zone which includes all of North Dakota and portions of South Dakota, Minnesota, and Wisconsin.

not recommended in connection with rates to and from points in Ohio, which were used in determining differentials via Cincinnati. Likewise no differentials via Cincinnati were recommended to and from points east of Pittsburgh. These suggested restrictions are opposed by the barge lines, which have no objection to what may be termed overlapping differentials via different ports, and appear not disposed to [fol. 54] criticize amounts of the differentials sought by each other. Therefore differentials are prescribed in connection with rates to and from points in Ohio via St. Louis and the Ohio River ports other than Cincinnati. It may be understood that the present differential rates to and from points east of Pittsburgh may be continued for application via Cincinnati and Pittsburgh, as requested by Valley and American.

Commodity Rates.—In arriving at rates on classes below first and column rates the usual percentages would of course be applied to the first-class barge-and-rail rate arrived at by use of the prescribed differentials. The barge lines propose that a similar method be followed in arriving at commodity rates, that is, that the barge-and-rail commodity rate shall have the same ratio to the all-rail commodity rate between the same points as that between the first-class differential rate and the all-rail first-class rate between those points. There appears to be no better way of dealing generally with commodity rates. It is agreed, however, that situations may arise in connection with individual commodities under which departures from such method would be desirable from the standpoint of all concerned.

One such commodity, which is of outstanding importance to the barge lines, is sugar. A large amount of evidence concerning sugar rates was presented in this proceeding, but before the hearings were concluded a voluntary adjustment was reached providing for a scheme of differentials differing from the general basis. The barge-and-rail rates on sugar have a vital relation to the general competitive rate relationships on sugar from all producing points to midwestern consuming points, and we consider it highly desirable that no change in sugar rates be made as a result of our findings here.

In our first report relating to Federal (77 I. C. C. 363) we said:

Moreover, insufficient thought seems to have been given to the possible disruption of established rate relationships. Doubtless some disruption is unavoidable and justifiable, but our impression is that under the barge line's plan it occurs to a greater extent than can be successfully defended, particularly in the case of export and import rates, where ports have been equalized.

The equalization above referred to chiefly affects New Orleans and the Texas ports, Galveston and Houston, and has been a continuing source of controversy in connection with barge-rail rates, as shown in *Cotton and Cotton Linters From South and Southwest, supra.* At the time of the hearings in this proceeding there were certain commodity rates on import traffic from New Orleans to Oklahoma City via Memphis which were lower than the corresponding all-rail rates from Houston to Oklahoma City, although the rail haul from Memphis to Oklahoma City is longer than the short-line rail distance from Houston. Such situations cannot be defended.

[fol. 55] Bulk commodities are largely handled in all-water service or on combination rates not under a common arrangement for through carriage, for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore interior points generally do not have facilities for handling such large consignments. For that reason we shall not prescribe through routes and joint rates on bulk commodities.

Both Federal and Valley hope that a way may be left open for them to agree with the railroads to narrow the differentials which we prescribe or to eliminate them altogether as to particular traffic at their option. The Denison Act contained an express provision to the effect that joint routes and rates prescribed under that act could be changed "by agreement of the water carriers and other participating carriers," thus permitting the flexibility which the barge lines seek here. However, they are unable to suggest any way of imparting such flexibility to an order entered under section 307 (d) of the Interstate Commerce Act. An obvious solution would be to enter no order unless

it should be necessary to do so to enforce compliance with our findings on the part of the railroad respondents. It is not unlikely that in the course of the work of establishing the rates herein prescribed, the desirability of numerous minor deviations therefrom may be disclosed. Much time and expense could undoubtedly be saved by avoiding the necessity of filing numerous petitions for modification of the order which otherwise would be necessary.

Transit.—Another major point of controversy between railroads and barge lines has grown out of the fact that the former have been unwilling to apply to barge-and-rail rates the same transit arrangements available to shippers on all-rail rates. In our first report on this subject, 77 I. C. C. 317, 363, we said:

> With respect to the various transit arrangements extended to shippers in connection with all-rail rates but withheld in the case of rail-and-barge rates, we are of the opinion that such arrangements should be extended to the latter rates, but that in such cases the originating rail line will usually be entitled, by reason of such extension, to a concession in divisions. The record does not permit a more specific conclusion upon this point.

Our orders under the Denison Act, which required us to prescribe "reasonable rules, regulations, and practices" in connection with joint rates, contained a similar provision. The question has since been presented in a considerable number of proceedings relating to transit on particular commodities, in which it has been found that the maintenance of transit arrangements at points on railroad lines in connection with all-rail rates and the failure concurrently to provide like transit in connection with joint barge-rail transportation of like traffic from the same points [fol. 56] of origin to the same destinations at rates not higher than those applicable on such traffic not accorded transit is unjust and unreasonable, *Storage in Transit on Artificial Rubber*, 266 I. C. C. 673, and other cases there cited. A similar finding may properly be made here with respect to the rates here prescribed.

Findings

1. We find that the amounts shown in appendix A and appendix B are justified as reasonable differentials to be deducted from the present first-class all-rail rates to and

from the key points therein named to determine joint first-class rates applicable to the transportation of property by the barge lines and railroad carriers which are respondents in this proceeding, and that joint rates on other classes and columns should be determined by application of the usual percentages to such joint first-class rates.

2. We find that joint commodity rates (not including commodities in bulk) from and to points referred to in appendix A and appendix B over lines of the aforesaid respondents should be established in amounts which would bear the same ratio to the all-rail commodity rates from and to the same points as that between the first-class all-rail rates and the first-class barge-and-rail rates from and to the same points, and that the differences between the all-rail and barge-and-rail commodity rates so established would be justified as differentials; provided, however, that this finding shall not affect the present barge-and-rail rates on sugar, in carloads, and shall not require the establishment of barge-and-rail commodity rate from New Orleans to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such destination from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans.

3. We find that the establishment of through routes and joint rates for the transportation of property subject to the differentials prescribed in findings 1 and 2 is necessary and desirable in the public interest.

4. We find that as a reasonable condition under which such through routes shall be operated, the barge-and-rail traffic over such routes shall be subject to the same transit arrangements as those which are available under the corresponding all-rail rates from and to the same points.

Respondents are requested to advise us within 90 days from the date of service of this report whether they will [fol. 57] establish routes and rates in substantial compliance with the foregoing findings. In the meantime entry of an order will be deferred.

On my own behalf I desire to make the following additional statement:

The differentials approved by this report are, in the final analysis, based largely on judgment and are necessarily more or less arbitrary. The greater portion of the evidence was presented prior to the effective date of part III of the Interstate Commerce Act and consequently the port-to-port tariff rates are not a part of the record. Under all the circumstances I believe the solution offered by this report is the best that this record affords, which brings me to what I wish here to propose.

I do not believe the problem presented can be permanently solved from a consideration of formulas, costs and related data, such as here relied upon by the parties. Such evidence may aid in arriving at seemingly just and reasonable differentials for application at the particular time of determination but there can be little doubt that they will not be entirely equitable and also will lack the essential quality of flexibility to meet constantly changing conditions.

In my opinion the basis, for making joint rates between common carriers by rail and those by water should be the same in principle as that used in making joint all-rail rates. A joint all-rail rate between two given points from and to which a joint barge-rail rate is to apply represents a certain percentage of the combination of all-rail factors to and from the port where barge and rail traffic is interchanged. I would apply the same percentage to the combination of barge and rail factors to and from the same port in determining the joint barge-and-rail rate. Although not here in issue, I also believe that consideration of divisions is necessary in arriving at proper differentials, and that the basis actually employed by the rail carriers should be used. In the examples given below I have used the rate prorate basis which gives results similar to those arrived at by using the bases the Commission has approved in several proceedings. However, I would add to the rail-line division the excess cost of switching barge-rail traffic at the ports over the expense of interchanging all-rail traffic. This excess at the present time is estimated to approximate 1 cent per 100 pounds for a carload of 26 tons. The following will illustrate the principle which I believe to be sound. The joint first-class all-rail rate from Memphis, Tenn., to Fargo, N. Dak., via the Twin Cities

is 266 cents per 100 pounds, while the combination of first-class rail rates is 342 cents made up of 223 cents to the Twin Cities and 119 cents beyond. Thus, the joint first-class all-rail rate is 77.7 percent of the combination all-[fol. 58] rail rate. The combination first-class barge-rail rate from Memphis to Fargo is 297 cents, made up of a barge rate of 178 cents to the Twin Cities and the above-mentioned rail rate of 119 cents beyond. I would also make the joint barge-rail rate 77.7 percent of the barge-rail combination, that is 231 cents, which would be 35 cents under the joint all-rail rate. Under the rate prorate basis, this rate of 231 cents would be divided 138 cents to the barge line and 93 cents to the rail lines, which, taking into consideration the 1-cent excess cost of switching above mentioned, would become 137 and 94 cents, respectively. Similar computations would result in joint barge-rail rates from New Orleans, La., to Norfolk, Va., via Cincinnati, Ohio, and from St. Louis, Mo., to Houston, Tex., via Baton Rouge, La., 33 and 30 cents, respectively, under the joint all-rail rates. The joint rate to Norfolk would be divided 126 cents to the barge line and 98 cents to the rail lines, and that to Houston, 118 cents to the former and 105 cents to the latter.

Evidently, the formula above indicated should not be prescribed on this record. It is here set forth with the thought that it may appeal to the parties and lead to subsequent agreements to its use. If such should be the case, much time and expensive litigation would be saved.

Commissioner Patterson did not participate in the disposition of these proceedings.

[fol. 59]

APPENDIX A

Prescribed differentials in cents per 100 pounds to be deducted from first-class all-rail rates in determining joint two-way rates with barge lines

SECTION 1

Between New Orleans, La., Baton Rouge, La. (except as noted), and—	Via Cincinnati	Peoria	Evansville	St. Louis Cairo	Louisville
Norfolk, Va.	26	..	..	..	..
Charleston, W. Va.	42	..	..	[1]26	..
Parkersburg, W. Va.	42	..	..	[1]26	..
Akron, Ohio	42	..	..	30	..
Cleveland, Ohio	42	..	38	38	39
Columbus, Ohio	42	..	38	38	39
Detroit, Mich.	42	..	38	38	39
Saginaw, Mich.	42	42	38	38	39
South Bend, Ind.	[1]40	42	38	38	39
Indianapolis, Ind.	[1]38	..	40	38	40
Evansville, Ind.	..	..	..	[1]32	..
Milwaukee, Wis.	..	42	38	38	..
Centralia, Ill.	..	..	..	38	..
Decatur, Ill.	..	..	..	38	..

	Via Twin Cities	Iowa ports [1]		Kansas City	
Fargo, N. Dak.	47	..	..	33	..
Rhinelander, Wis.	44	..	..	36	..
Mason City, Iowa	..	44	..	38	..
Omaha, Nebr.	..	..	..	35	37
Cheyenne, Wyo.	..	..	..	32	35
Salina, Kans.	..	..	..	..	29
Chillicothe, Mo.	..	..	..	39	..

	Via Cairo St. Louis	Memphis	Evansville		
Bismarck, Mo.	34	..	..	..	..
Wichita, Kans.	..	[1]26	..	..	..
Joplin, Mo.	..	28	..	..	..
Enid, Okla.	..	[1]14	..	..	..
Hopkinsville, Ky.	..	26	26	..	..
Corinth, Miss.	..	14	..	..	..

	Via Helena Memphis	Greenville	Vicksburg	Baton Rouge
Stuttgart, Ark.	25	..	..	..
Clarksdale, Miss.	..	20	..	..
Corsicana, Tex.	..	..	[1][2]11	..
Dallas, Tex.	..	..	[1][2]11	..
El Dorado, Ark.	..	..	[1]23	..
Belzoni, Miss.	..	..	[1]20	..
Alexandria, La.	..	..	..	[1]9
Natchez, Miss.	..	..	..	[1]9

	Via Mobile	Port Birmingham		
Savannah, Ga.	[1]18	..	..	..
Augusta, Ga.	..	20	..	..
Knoxville, Tenn.	..	26	..	..

Footnote on p. 632.

[fol. 60]

SECTION 2

Between Baton Rouge, La., and—	Via Vicksburg	New Orleans	Mobile
El Dorado, Ark	19	..	..
Belzoni, Miss	16	..	..
Jackson, Miss	7	..	..
Biloxi, Miss	..	8	..
Savannah, Ga	..	..	20

SECTION 3

Between Vicksburg, Miss., and—	Via Twin Cities	St. Louis Cairo	Iowa ports [3]	Peoria	Kansas City
Fargo, N. Dak	47	32	..	..	..
Rhinelander, Wis	39	33	..	..	..
Mason City, Iowa	..	34	44	..	..
Cheyenne, Wyo	..	29	..	..	33
Omaha, Nebr	..	31	..	..	34
Salina, Kans	..	..	..	..	27
Chillicothe, Mo	..	34	..	..	..

	Via Cincinnati		Evansville		Louisville
Norfolk, Va	26	..	..	..	..
Parkersburg, W. Va	34	[1] 18	..	..	..
Charleston, W. Va	34	[1] 18	..	..	..
Akron, Ohio	34	32	..	..	..
Cleveland, Ohio	34	30	31	..	32
Columbus, Ohio	34	22	22	..	32
Milwaukee, Wis	..	33	33	37	..
Saginaw, Mich	34	32	32	34	32
Grand Rapids, Mich	34	32	32	34	32
Detroit, Mich	34	30	31	..	32
South Bend, Ind	[2] 34	32	32	..	32
Indianapolis, Ind	[2] 31	32	32	..	32
Evansville, Ind	..	[1] 27	..	..	..
Decatur, Ill	..	35	..	..	..
Centralia, Ill	..	35	..	..	..

	Via Cairo St. Louis	Memphis		Helena	Greenville
Bismarck, Mo	28	..	..	..	..
Joplin, Mo	..	[7] 21	..	..	..
Hopkinsville, Ky	..	20	20	..	..
Corinth, Miss	..	15	..	..	..
Stuttgart, Ark	..	..	..	17	..
Clarksdale, Miss	..	..	..	..	11

	Via Baton Rouge New Orleans	New Orleans			
Corpus Christi, Tex	12	..	..	..	..
Houston, Tex	14	..	..	..	..
New Iberia, La	17	..	..	..	..
Biloxi, Miss	..	8	..	..	..

Footnote on p. 632.

[fol. 61]

SECTION 4

Between Greenville, Miss., and—	Via Twin Cities	Iowa ports	St. Louis Cairo	Kansas City
Fargo, N. Dak.	41	..	25	..
Rhinelander, Wis.	35	..	27	..
Mason City, Iowa	..	34	28	..
Omaha, Nebr.	..	..	22	..
Cheyenne, Wyo.	..	..	23	26
Chillicothe, Mo.	..	..	28	..
Salina, Kans.	..	..	..	24
Bismarck, Mo.	..	..	[1]32	..
		Peoria		
Milwaukee, Wis.	..	37	30	..
Charleston, W. Va.	..	..	[1]13	..
Parkersburg, W. Va.	..	..	[1]13	..
Akron, Ohio	..	..	16	..
Columbus, Ohio	..	..	16	..
Cleveland, Ohio	..	..	27	..
Detroit, Mich.	..	..	27	..
Saginaw, Mich.	..	30	27	..
Grand Rapids, Mich.	..	..	..	..
South Bend, Ind.	..	30	27	..
Indianapolis, Ind.	..	..	27	..
Evansville, Ind.	..	..	[1]23	..
Decatur, Ill.	..	..	31	..
Centralia, Ill.	..	..	[1]31	..

	Via Memphis	Helena		
Joplin, Mo.	15	..	..	..
Hopkinsville, Ky.	17	..	..	..
Corinth, Miss.	12	..	..	..
Stuttgart, Ark.	..	14	..	..

	Via Vicksburg	Baton Rouge	New Orleans	
Alexandria, La.	14	..	..	..
Brookhaven, Miss.	10	..	..	..
Corpus Christi, Tex.	..	16	16	..
Houston, Tex.	..	18	18	..
New Iberia, La.	..	21	21	..
Biloxi, Miss.	..	..	10	..

Footnote on p. 632.

[fol. 62]

SECTION 5

Between Memphis, Tenn., Helena, Ark. (except as noted), and—	Via Twin Cities	Iowa ports [3]	St. Louis Cairo	Kansas City
Fargo, N. Dak.	39	..	22	..
Rhinelander, Wis.	33	..	24	..
Mason City, Iowa	..	32	24	..
Cheyenne, Wyo.	..	..	18	22
Omaha, Nebr.	..	..	20	25
Salina, Kans.	..	..	..	18
Chillicothe, Mo.	..	..	24	..

Between Memphis, Tenn., Helena, Ark. (except as noted), and—	Via Peoria	Cincinnati	St. Louis Cairo	Evansville	Louisville
Milwaukee, Wis.	29	..	24	24	..
South Bend, Ind.	26	[2] 26	22	26	26
Grand Rapids, Mich.	26	26	22	24	24
Saginaw, Mich.	26	26	22	22	24
Detroit, Mich.	..	26	22	22	24
Cleveland, Ohio	..	26	22	22	24
Columbus, Ohio	..	26	15	15	24
Parkersburg, W. Va.	..	26	..	..	..
Charleston, W. Va.	..	26	..	..	..
Norfolk, Va.	..	26	..	..	..
Indianapolis, Ind.	..	[2] 24	22	22	24
Akron, Ohio	..	..	15	..	..

		Via Cairo	St. Louis		
Decatur, Ill.	..	24	24	..	..
Centralia, Ill.	..	24	24	..	..
Bismarck, Mo.	..	26	17	..	..

	Via Vicksburg	Baton Rouge	New Orleans		
Navasota, Tex.	[3] 19	..	..	..	..
Alexandria, La.	[3] 22	..	..	..	..
Brookhaven, Miss.	[3] 17	..	..	..	..
Corpus Christi, Tex.	..	[3] 22	[3] 22	..	..
Houston, Tex.	..	[3] 24	[3] 24	..	..
New Iberia, La.	..	[3] 27	[3] 27	..	..
Biloxi, Miss.	..	..	[3] 17	..	..

SECTION 6

Between Helena, Ark., and—	Via Memphis	Vicksburg	Baton Rouge	New Orleans
Hopkinsville, Ky.	13	..	..	..
Corinth, Miss.	7	..	..	..
Alexandria, La.	..	17	..	..
Brookhaven, Miss.	..	12	..	..
Corpus Christi, Tex.	..	..	18	18
Houston, Tex.	..	..	20	20
New Iberia, La.	..	..	23	..
Biloxi, Miss.	..	..	..	12

Footnote on p. 2.

[fol. 63]

SECTION 7

Between Cairo, Ill., and—	Via Twin Cities	Iowa ports [3]	Peoria	St. Louis
Fargo, N. Dak.	36	..	..	14
Rhinelander, Wis.	28	..	..	14
Mason City, Iowa	..	23	..	..
Milwaukee, Wis.	..	..	20	..
South Bend, Ind.	..	..	14	..
Grand Rapids, Mich.	..	..	14	..
Saginaw, Mich.	..	..	14	..

	Via Kansas City			
Norfolk, Nebr.	23	..	..	..
Denver, Colo.	27	..	..	..
Omaha, Nebr.	..	..	..	10

	Via Memphis	Vicksburg	Baton Rouge	New Orleans
Fort Smith, Ark.	17	..	..	..
Dallas, Tex.	21	21	..	..
Little Rock, Ark.	27	..	..	..
Meridian, Miss.	17	17	..	..
Brookhaven, Miss.	..	17	..	..
Biloxi, Miss.	..	..	..	20
Montgomery, Ala.	..	17	..	..
San Antonio, Tex.	27	27	27	..
Navasota, Tex.	27	27	30	30
Corpus Christi, Tex.	..	..	..	..
Houston, Tex.	..	..	32	32
Alexandria, La.	..	27	27	..
New Iberia, La.	..	..	35	35

SECTION 8

Between St. Louis, Mo., and—	Via Twin Cities	Iowa ports [3]	Cairo	Memphis
Fargo, N. Dak.	33	..	..	..
Rhinelander, Wis.	21	..	..	..
Mason City, Iowa	..	14	..	..
Jackson, Tenn.	..	..	15	15
Montgomery, Ala.	..	..	15	..
Fort Smith, Ark.	..	..	..	18
Little Rock, Ark.	..	..	..	20

	Via Vicksburg			
Meridian, Miss.	20	..	..	20
Dallas, Tex.	22	..	..	22

		Baton Rouge	New Orleans	Kansas City
San Antonio, Tex.	29	29	29	..
Navasota, Tex.	29	29	29	..
Corpus Christi, Tex.	..	30	30	..
Houston, Tex.	..	32	32	..
Alexandria, La.	32	32	32	..
New Iberia, La.	..	35	35	..
Brookhaven, Miss.	20	..	..	..
Biloxi, Miss.	..	..	25	..
Norfolk, Nebr.	..	..	..	20
Denver, Colo.	..	..	..	23
Enid, Okla.	..	..	..	16

Footnote on p. 632.

[fol. 64]

SECTION 9

Between Peoria, Ill., and—	Via St. Louis	Cairo	Memphis	Vicksburg
Joplin, Mo.	9	..	..	..
Paragould, Ark.	..	17	..	..
Atlanta, Ga.	..	17	..	..
Jackson, Tenn.	..	17	..	..
Montgomery, Ala.	..	24	..	..
Fort Smith, Ark	..	..	18	..
Dallas, Tex.	..	..	28	..
Little Rock, Ark.	..	..	32	..
Meridian, Miss.	..	..	32	..
San Antonio, Tex.	..	..	..	32
Navasota, Tex.	..	..	..	32
Alexandria, La.	..	..	..	35
Brookhaven, Miss.	..	..	..	38

	Via Baton Rouge	New Orleans	Kansas City
Corpus Christi, Tex.	35	35	..
Houston, Tex.	37	37	..
New Iberia, La.	40	40	..
Biloxi, Miss.	..	38	..
Denver, Colo.	..	..	23
Enid, Okla.	..	..	20

SECTION 10

Between Chicago, Ill., and—	Via St. Louis	Cairo	Memphis	Vicksburg	Kansas City
Joplin, Mo.	20	..	..	..	..
Paragould, Ark.	..	22	..	..	..
Hopkinsville, Ky.	..	17	..	..	..
Atlanta, Ga.	..	17	..	..	..
Jackson, Tenn.	..	17	..	..	..
Montgomery, Ala.	..	24	..	..	..
Fort Smith, Ark.	..	..	22	..	..
Little Rock, Ark.	..	..	34	..	..
Dallas, Tex.	..	..	31	..	..
Meridian, Miss.	..	..	32	..	..
San Antonio, Tex.	..	..	..	37	..
Navasota, Tex.	..	..	..	37	..
Alexandria, La.	..	..	..	40	..
Brookhaven, Miss.	..	..	..	38	..
Denver, Colo.	..	..	..	..	21
Enid, Okla.	..	..	..	..	20

	Via Baton Rouge	New Orleans		
Corpus Christi, Tex.	40	40	..	..
Houston, Tex.	42	42	..	..
New Iberia, La.	45	45	..	..
Biloxi, Miss.	..	38	..	..

[fol. 65]

SECTION 11

Between Dubuque, Iowa, Rock Island, Ill., Burlington, Iowa, Clinton, Iowa, and—	Via Twin Cities	St. Louis
Fargo, N. Dak.	25 (Burlington). 22 (Dubuque, Rock Island and Clinton).	
Rhinelander, Wis.	13 (Burlington). 10 (Dubuque, Rock Island and Clinton).	
Joplin, Mo.		12 (Burlington). 14 (Rock Island and Clinton). 17 (Dubuque).
Dallas, Tex.		22 12 (Burlington, Rock Island and Clinton). 17 (Dubuque).
Fort Smith, Ark.		27 (Burlington, Rock Island, Clinton). 32 (Dubuque).
Little Rock, Ark.		32 18
Meridian, Miss.		
Knoxville, Tenn.		

	Via Cairo	
Paragould, Ark.	22 (Burlington). 24 (Rock Island, Clinton). 27 (Dubuque).	
Atlanta, Ga.	23	
Montgomery, Ala.	23	

	Via Vicksburg	
San Antonio, Tex.	17 (Burlington, Rock Island, Clinton). 22 (Dubuque).	
Navasota, Tex.	22 (Burlington, Rock Island, Clinton). 27 (Dubuque).	
Alexandria, La.	32 (Burlington, Rock Island, Clinton). 37 (Dubuque).	
Brookhaven, Miss.	37	

	Via Baton Rouge New Orleans	
Corpus Christi, Tex.	17 (Burlington, Clinton, Rock Island). 22 (Dubuque).	
Houston, Tex.	22 (Burlington, Clinton, Rock Island). 27 (Dubuque).	
New Iberia, La.	32 (Burlington, Clinton, Rock Island). 35 (Dubuque).	
Biloxi, Miss.	37	

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SECTION 12

Between St. Paul, Minn., Minneapolis, Minn., and—	Via Dubuque	Rock Island Clinton	Burlington	St. Louis
Cedar Rapids, Iowa	12	..	..	..
Chicago, Ill.	18	..	..	..
Peoria, Ill.	..	20	..	..
Chillicothe, Mo.	..	12	..	..
Kansas City, Mo.	..	..	14	..
Springfield, Ill.	..	..	24	..
Centralia	..	..	..	25
Joplin, Mo.	..	..	..	16
Cincinnati, Ohio	..	..	..	20
Knoxville, Tenn.	..	..	..	22

	Via Cairo	Memphis	Vicksburg	
Paragould, Ark.	32	..	..	..
Atlanta, Ga.	34	..	..	..
Fort Smith, Ark.	..	17	..	..
Dallas, Tex.	..	22	..	..
Little Rock, Ark.	..	40	..	..
Meridian, Miss.	..	43	..	..
San Antonio, Tex.	..	..	22	..
Navasota, Tex.	..	..	27	..
Alexandria, La.	..	..	41	..
Brookhaven, Miss.	..	..	51	..
Montgomery, Ala.	34	..	..	..

	Via Baton Rouge New Orleans			
Corpus Christi, Tex.	22	..	..	..
Houston, Tex.	30	..	..	..
New Iberia, La.	45	..	..	..
Biloxi, Miss.	[9] 46	..	..	..

SECTION 13

Between Cincinnati, Ohio, and—	Via Memphis	Vicksburg	Baton Rouge	New Orleans
Little Rock, Ark.	29	..	..	..
Fort Smith, Ark.	25	..	..	..
Ardmore, Okla.	25	..	..	..
Oklahoma City, Okla.	25	..	..	..
Wichita Falls, Tex.	25	..	..	..
Corinth, Miss.	[10] 17	..	..	..
Meridian, Miss.	..	[11] 29	..	..
Dallas, Tex.	..	34	34	..
Shreveport, La.	..	36	36	..
Waco, Tex.	..	36	36	..
San Antonio, Tex.	..	..	41	41
Corpus Christi, Tex.	..	..	46	46
Houston, Tex.	..	..	46	46
Lafayette, La.	..	..	46	46
Mobile, Ala.	..	..	..	[12] 34

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SECTION 14

Between Louisville, Ky., and—	Via Memphis	Vicksburg	Baton Rouge	New Orleans
Little Rock, Ark.	24	..	..	..
Fort Smith, Ark.	20	..	..	..
Ardmore, Okla.	20	..	..	..
Oklahoma City, Okla.	20	..	..	..
Wichita Falls, Tex.	20	..	..	..
Corinth, Miss.	[10] 17	..	..	..
Meridian, Miss.	..	[11] 24	..	..
Dallas, Tex.	..	29	..	..
Shreveport, La.	..	31	..	..
Waco, Tex.	..	31	31	..
San Antonio, Tex.	..	..	36	..
Corpus Christi, Tex.	..	..	41	..
Houston, Tex.	..	..	41	..
Lafayette, La.	..	..	41	41
Alexandria, La.	..	..	41	41
New Iberia, La.	..	..	41	41
Mobile, Ala.	..	..	..	[12] 29

SECTION 15

Between Evansville, Ind., and—	Via Memphis	Vicksburg	Baton Rouge	New Orleans
Little Rock, Ark.	27	..	..	..
Fort Smith, Ark.	17	..	..	..
Oklahoma City, Okla.	17	..	..	..
Wichita Falls, Tex.	17	..	..	..
Dallas, Tex.	..	22	..	..
Shreveport, La.	..	29	..	..
Waco, Tex.	..	29	29	..
Meridian, Miss.	..	20	..	..
Corinth, Miss.	[7] 17	..	..	..
San Antonio, Tex.	..	..	29	..
Navasota, Tex.	..	..	29	..
Alexandria, La.	..	..	32	..
Corpus Christi, Tex.	..	..	30	..
Houston, Tex.	..	..	32	..
Mobile, Ala.	..	..	..	[12] 22

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SECTION 16

Between Mobile, Ala., and—	Via Twin Cities	Iowa ports [3]	St. Louis Cairo	Kansas City
Fargo, N. Dak.	36	..	23	..
Rhinelander, Wis.	33	..	26	..
Mason City, Iowa	..	34	..	..
Cheyenne, Wyo.	..	..	21	24
Omaha, Nebr.	..	..	24	26
Salina, Kans.	..	..	..	18
Chillicothe, Mo.	..	..	28	..
Decatur, Ill.	..	..	28	..
Indianapolis, Ind.	..	..	28	..
Via Peoria				
Milwaukee, Wis.	35	..	28	..
South Bend, Ind.	32	..	28	..
Grand Rapids, Mich.	32	..	28	..
Saginaw, Mich.	32	..	28	..
Detroit, Mich.	..	..	28	..
Akron, Ohio	..	..	15	..
Cleveland, Ohio	..	..	28	..
Columbus, Ohio	..	..	15	..

	Via Cairo	Memphis	Helena	Greenville	Vicksburg
Charleston, W. Va.	16	..	..	..	..
Parkersburg, W. Va.	16	..	..	..	..
Evansville, Ind.	20	..	..	..	..
Centralia, Ill.	28	..	..	..	..
Bismarck, Mo.	26	..	..	..	..
Wichita, Kans.	..	[4] 15	..	..	..
Enid, Okla.	..	[5] 15	..	..	..
Joplin, Mo.	..	18	..	..	..
Hopkinsville, Ky.	..	16	..	..	..
Corinth, Miss.	..	10	..	..	..
Stuttgart, Ark.	..	..	15	..	..
Clarksdale, Miss.	..	..	..	10	..
Dallas, Tex.	..	..	..	..	[5] 10
Corsicana, Tex.	..	..	..	..	[5] 7
El Dorado, Ark.	..	..	..	..	13
Belzoni, Miss.	..	..	..	..	10
Jackson, Miss.	..	..	..	..	5

	Via Baton Rouge	New Orleans	Port Birmingham	
Alexandria, La.	7	..	..	..
Waco, Tex.	..	9	..	..
Palestine, Tex.	..	12	..	..
Houston, Tex.	..	18	..	..
Knoxville, Tenn.	..	..	22	..
Augusta, Ga.	..	..	16	..

SECTION 17

Between Port Birmingham, Ala., and—	Via New Orleans	Mobile
Waco, Tex.	19	..
Palestine, Tex.	22	..
Houston, Tex.	28	..
Biloxi, Miss.	..	22

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SECTION 18

Between Kansas City, Mo., and—	Via Peoria	St. Louis	Cairo	Memphis	Vicksburg	New Orleans
Chicago, Ill.	19	..	..	..	..	..
Springfield, Ill.	..	16	..	..	..	..
Cincinnati, Ohio	..	23	..	..	..	..
Atlanta, Ga.	..	17	..	..	..	..
Columbus, Ga.	..	..	23	..	..	..
Meridian, Miss.	..	..	..	25	..	..
Brookhaven, Miss.	..	..	..	..	30	..
Biloxi, Miss.	..	..	..	..	..	28

[1] Via Cairo only.
[2] Not prescribed for application to and from points west of the line of the Pennsylvania Railroad Company between Louisville, Ky., and South Bend, Ind.
[3] Dubuque, Clinton, and Burlington, Iowa, and Rock Island, Ill.
[4] Not prescribed for application to and from points west of Dodge City, Kans.
[5] Not prescribed for application to and from points west of the line of the Chicago, Rock Island and Pacific Railway Companyfrom Medford, Okla., to Corsicana, Tex.
[6] From and to New Orleans only.
[7] Not prescribed for application to and from points south of the line of the Missouri and Arkansas Railway Company between Joplin, Mo., and Wheatley, Ark.
[8] From and to Memphis only.
[9] Via New Orleans only.
[10] Not prescribed for application to and from points east of the line of the Gulf, Mobile & Ohio Railroad Company between Corinth and West Point, Miss.
[11] Not prescribed for application to and from points east of Meridian, Miss.
[12] Not prescribed for application to and from points east of Mobile, Ala.

APPENDIX B

Prescribed differentials in cents per 100 pounds to be deducted from first-class all-rail rates in determining joint three-way rates with barge lines

SECTION 1

Between Fargo, N. Dak., and—	Via Twin Cities Dubuque	Twin Cities Iowa ports [1]	Twin Cities Burlington	Twin Cities St. Louis
Chicago, Ill.	15	..	..	..
Peoria, Ill.	..	18	..	..
Springfield, Ill.	..	..	22	..
Centralia, Ill.	..	..	..	24
Knoxville, Tenn.	..	..	..	20
Cincinnati, Ohio	..	..	..	18
Cedar Rapids, Iowa	12	..	..	..
Chillicothe, Mo.	..	12	..	..
Kansas City, Mo.	..	..	14	..
Joplin, Mo.	..	..	..	[3] 16

SECTION 2

Between Paragould, Ark., and—	Via Twin Cities Cairo	Peoria Cairo	Iowa ports [1] Cairo
Fargo, N. Dak.	30	..	..
Rhinelander, Wis.	21	..	..
Mason City, Iowa	..	..	15
Milwaukee, Wis.	..	10	..
South Bend, Ind.	..	12	..

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SECTION 3

Between Montgomery, Ala., and—	Via Twin Cities Cairo	Iowa ports [1] Cairo	Peoria Cairo
Fargo, N. Dak.	16	..	..
Rhinelander, Wis.	[2] 17	..	..
Mason City, Iowa	..	16	..
Milwaukee, Wis.	..	..	17

SECTION 4

Between Atlanta, Ga., and—	Via Twin Cities Cairo	Iowa ports [1] Cairo
Fargo, N. Dak.	24	..
Mason City, Iowa	..	15

SECTION 5

Between Fort Smith, Ark.,[4] and—	Via Twin Cities Memphis	Peoria Memphis	St. Louis Memphis
Rhinelander, Wis.	[2] 12	..	..
Milwaukee, Wis.	..	17	12
Decatur, Ill.	..	..	14

	Via Cincinnati Memphis		St. Louis Cairo Memphis	Louisville Evansville Memphis
Saginaw, Mich.	17	17	14	15
Grand Rapids, Mich.	17	17	14	15
South Bend, Ind.	[2] 16	17	14	16
Indianapolis, Ind.	[2] 15	14	..	15
Detroit, Mich.	17	..	..	15
Columbus, Ohio	17	..	..	15
Cleveland, Ohio	17	..	..	15
Parkersburg, W. Va.	17	..	..	..
Charleston, W. Va.	17	..	..	..

SECTION 6

Between Dallas, Tex.,[5] and—	Via Twin Cities Memphis	St. Louis Memphis	Iowa ports [1] Memphis	Peoria Memphis
Fargo, N. Dak.	22	..	..	..
Rhinelander, Wis.	17	14	..	..
Mason City, Iowa	..	..	17	..
Milwaukee, Wis.	..	..	..	24

	Via Cincinnati Memphis		Louisville Evansville Memphis	
South Bend, Ind.	[2] 22	22	22	24
Saginaw, Mich.	24	22	22	24
Grand Rapids, Mich.	24	22	22	24

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SECTION 6—continued

Between Dallas, Tex.,[5] and—	Via Cincinnati Baton Rouge	St. Louis Memphis	Louisville Memphis	Evansville Memphis
Detroit, Mich.	24	20	22	20
Columbus, Ohio	24	..	22	20
Cleveland, Ohio	24	20	22	20
Parkersburg, W. Va.	24	..	..	..
Charleston, W. Va.	24	..	..	..
Decatur, Ill.	..	22	..	..
Centralia, Ill.	..	18	..	..
Indianapolis, Ind.	..	15	..	15

SECTION 7

Between Little Rock, Ark., and—	Via Twin Cities Memphis	St. Louis Memphis	Iowa ports[1] Memphis	Peoria Memphis	
St. Cloud, Minn.	27	14	..	..	..
Rhinelander, Wis.	32	14	..	..	..
Mason City, Iowa	..	11	27	..	..
Milwaukee, Wis.	..	16	..	21	..

	Via Cincinnati Memphis		Evansville Memphis		Louisv'l'e Memphis
South Bend, Ind.	[9] 21	18	19	21	19
Saginaw, Mich.	21	18	19	21	19
Grand Rapids, Mich.	21	18	19	21	19
Detroit, Mich.	21	..	19	..	19
Cleveland, Ohio	21	..	19	..	19
Columbus, Ohio	21	..	19	..	19
Parkersburg, W. Va.	21	..	..	..	..
Charleston, W. Va.	21	..	..	..	..
Decatur, Ill.	..	15	..	..	..
Centralia, Ill.	..	13	..	..	..
Indianapolis, Ind.	15	15	15	..	15

SECTION 8

Between Meridian, Miss.,[6] and—	Via Twin Cities Memphis	St. Louis Cairo Memphis Vicksburg	Iowa ports[1] Memphis	Peoria Memphis	
Fargo, N. Dak.	29	17	..	..	..
Rhinelander, Wis.	25	17	..	..	..
Mason City, Iowa	..	13	22	..	..
Milwaukee, Wis.	..	13	..	22	..
Chillicothe, Mo.	..	17	..	..	..

	Via Cincinnati Vicksburg		Evansville Memphis Vicksburg		Louisville Memphis Vicksburg
South Bend, Ind.	18	13	17	18	17
Decatur, Ill.	..	15	..	..	..
Centralia, Ill.	..	15	..	..	..
Bismarck, Mo.	..	11	..	..	..
Indianapolis, Ind.	[9] 15	15	17	..	17
Grand Rapids, Mich.	18	..	17	18	17
Saginaw, Mich.	18	..	..	18	..
Cleveland, Ohio	18	..	..	..	14
Columbus, Ohio	18	..	..	..	14
Detroit, Mich.	18	..	..	..	14
Charleston, W. Va.	18	..	..	..	..
Parkersburg, W. Va.	18	..	..	..	..

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SECTION 9

Between San Antonio, Tex., and—	Via St. Louis Cairo Vicksburg	Peoria Vicksburg	Cincinnati Baton Rouge	Evansville Baton Rouge	Louisville New Orleans
Rhinelander, Wis.	19	..	..	..	..
Milwaukee, Wis.	27	32	..	..	..
South Bend, Ind.	27	30	[1]29	28	28
Grand Rapids, Mich.	27	30	30	28	28
Saginaw, Mich.	27	30	30	28	28
Decatur, Ill.	27	..	..	..	..
Centralia, Ill.	27	..	..	..	..
Indianapolis, Ind.	25	..	[1]25	27	27
Charleston, W. Va.	..	..	30	..	..
Parkersburg, W. Va.	..	..	30	..	..
Detroit, Mich.	..	..	..	..	..

Between San Antonio, Tex., and—	Via St. Louis Cairo Baton Rouge New Orleans			Memphis Vicksburg	
Detroit, Mich.	26	..	30	..	..
Cleveland, Ohio	26	..	30	..	..
Hopkinsville, Ky.	..	..	..	14	..

SECTION 10

Between Navasota, Tex., and—	Via Twin Cities Vicksburg	St. Louis Cairo Vicksburg Baton Rouge	Iowa ports [1] Vicksburg	Peoria Vicksburg	Louisville New Orleans
St. Cloud, Minn.	22	..	..	..	..
Rhinelander, Wis.	22	19	..	..	..
Cedar Rapids, Iowa	..	..	..	17	..
Milwaukee, Wis.	..	..	..	..	..

	Via Cincinnati Baton Rouge		Evansville Baton Rouge		
South Bend, Ind.	[1]30	27	29	30	29
Grand Rapids, Mich.	30	27	29	30	29
Saginaw, Mich.	30	27	29	30	29
Decatur, Ill.	..	27	..	..	..
Centralia, Ill.	..	27	..	..	..
Columbus, Ohio	30	..	..	..	27
Parkersburg, W. Va.	30	..	..	..	..
Charleston, W. Va.	30	..	..	..	..
Norfolk, Va.	30	..	..	..	..
Indianapolis, Ind.	[1]21	21	23		23

		St. Louis Cairo Baton Rouge New Orleans	Memphis Vicksburg		
Detroit, Mich.	30	26	..	..	..
Cleveland, Ohio	30	26	..	..	..
Hopkinsville, Ky.	..	..	14	..	..

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SECTION 10a

Between Corsicana, Tex., and—	Via Cincinnati Baton Rouge
South Bend, Ind.	28
Grand Rapids, Mich.	28
Saginaw, Mich.	28
Columbus, Ohio	30
Parkersburg, W. Va.	30
Charleston, W. Va.	30
Norfolk, Va.	30
Indianapolis, Ind.	21

SECTION 11

Between Alexandria, La., and—	Via Twin Cities Vicksburg	St. Louis Cairo Vicksburg Baton Rouge	Iowa ports[1] Vicksburg	Peoria Vicksburg	Louisville New Orleans
St. Cloud, Minn.	37	17	..	..	..
Rhinelander, Wis.	35	22	..	..	..
Cedar Rapids, Iowa	..	17	27	..	..
Milwaukee, Wis.	..	30	..	35	..

	Via Cincinnati Baton Rouge		Evansville Baton Rouge		
South Bend, Ind.	34	30	32	34	32
Grand Rapids, Mich.	34	30	32	34	32
Saginaw, Mich.	34	30	32	34	32
Indianapolis, Ind.	27	27	29	..	29
Decatur, Ill.	..	30	..	..	..
Centralia, Ill.	..	30	..	..	..
Parkersburg, W. Va.	34	..	..	..	..
Charleston, W. Va.	34	..	..	..	..
Norfolk, Va.	34	..	..	..	..

	St. Louis Cairo Vicksburg	Memphis Vicksburg	Cairo Vicksburg	
Akron, Ohio	20	..	..	..
Cleveland, Ohio	28	..	..	..
Detroit, Mich.	28	..	..	..
Hopkinsville, Ky.	..	17	..	..
Evansville, Ind.	..	..	27	..

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Between Brookhaven, Miss., and—	Via Twin Cities Vicksburg	St. Louis Cairo Vicksburg	Iowa ports [1] Vicksburg	Peoria Vicksburg	Louisville Memphis
Fargo, N. Dak.	32	17	..	..	..
Rhinelander, Wis.	29	17	..	..	..
Mason City, Iowa	..	17	29	..	..
Chillicothe, Mo.	..	17	..	..	..
Milwaukee, Wis.	..	17	..	25	..
	Via Cincinnati Vicksburg		Evansville Vicksburg		
South Bend, Ind.	[9] 20	..	19	20	19
Grand Rapids, Mich.	20	17	19	..	19
Saginaw, Mich.	20	..	19	20	19
Cleveland, Ohio	23	17	19	..	19
Detroit, Mich.	23	17	19	..	19
Columbus, Ohio	23	..	19	..	19
Parkersburg, W. Va.	23	..	..	..	..
Charleston, W. Va.	23	..	..	..	..
Norfolk, Va.	23	..	..	..	..
Cheyenne, Wyo.	..	17	..	..	..
Omaha, Nebr.	..	17	..	..	..
Indianapolis, Ind.	[9] 17	17	15	..	15
Decatur, Ill.	..	17	..	..	..
Centralia, Ill.	..	17	..	..	..
Bismarck, Mo.	..	17	..	..	..
			Memphis Vicksburg		
Joplin, Mo.	..	..	15	..	..

SECTION 12

Between Corpus Christi, Tex., and—	Via St. Louis Cairo Baton Rouge New Orleans	Peoria Baton Rouge New Orleans	Evansville Baton Rouge New Orleans	Louisville New Orleans	Cincinnati Baton Rouge New Orleans
Rhinelander, Wis.	18	31	..	..	..
Milwaukee, Wis.	28	31	..	..	..
South Bend, Ind.	28	31	28	28	[9] 31
Grand Rapids, Mich.	28	31	28	28	31
Saginaw, Mich.	28	31	28	28	31
Detroit, Mich.	26	..	..	28	31
Cleveland, Ohio	26	..	..	28	31
Columbus, Ohio	16	..	..	28	31
Akron, Ohio	16	..	..	..	31
Parkersburg, W. Va.	..	..	..	..	31
Charleston, W. Va.	..	..	..	..	31
Norfolk, Va.	..	..	..	..	22
Indianapolis, Ind.	26	..	28	28	[9] 26
Decatur, Ill.	28	..	..	..	..
Centralia, Ill.	28	..	..	..	..
Evansville, Ind.	[7] 22	..	..	..	..
		Memphis Baton Rouge New Orleans			
Hopkinsville, Ky.	..	16	16	..	..

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SECTION 13

Between Houston, Tex., and—	Via Twin Cities Baton Rouge New Orleans	St. Louis Cairo Baton Rouge New Orleans	Iowa points Baton Rouge New Orleans	Louisville New Orleans	Peoria Baton Rouge New Orleans
St. Cloud, Minn.	30	17	..	..	..
Rhinelander, Wis.	27	22	..	..	..
Cedar Rapids Iowa	..	17	23	..	..
Milwaukee, Wis.	..	32	..	..	37

	Cincinnati Baton Rouge		Evansville Baton Rouge		
South Bend, Ind.	[6] 37	32	35	35	37
Grand Rapids, Mich.	37	32	35	35	37
Saginaw, Mich.	37	32	35	35	37
Detroit, Mich.	37	30	35	35	37
Decatur, Ill.	..	30	..	..	..
Indianapolis, Ind.	[6] 32	32	34	34	..
Centralia, Ill.	..	32	..	..	..
Evansville, Ind.	..	[7] 30	..	..	..

					Port Birmingham New Orleans
Akron, Ohio	37	20	..	..	..
Cleveland, Ohio	37	30	..	35	..
Columbus, Ohio	37	20	..	35	..
Parkersburg, W. Va.	37	..	..	..	..
Charleston, W. Va.	37	..	..	..	..
Norfolk, Va.	22	..	..	..	22
Knoxville, Tenn.	..	..	..	..	22
Augusta, Ga.	..	..	..	..	20

	Memphis Baton Rouge New Orleans			
Hopkinsville, Ky.	30	30	..	..

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SECTION 14

Between New Iberia, La., and—	Via Twin Cities Baton Rouge New Orleans	St. Louis Cairo Baton Rouge New Orleans	Iowa ports [1] Baton Rouge New Orleans	Louisville New Orleans	Peoria Baton Rouge New Orleans
Fargo, N. Dak.	42	32	..	..	..
Rhinelander, Wis.	40	35	..	..	..
Mason City, Iowa	..	31	31	..	..
Milwaukee, Wis.	..	35	..	..	39
	Cincinnati Baton Rouge		Evansville Baton Rouge		
Grand Rapids, Mich.	39	35	37	37	39
Saginaw, Mich.	39	35	35	..	..
South Bend, Ind.	[9] 39	35	35	37	39
Detroit, Mich.	39	32	..	37	39
Akron, Ohio	39	23	..	..	..
Cleveland, Ohio	39	32	..	35	..
Columbus, Ohio	39	23	..	35	..
Parkersburg, W. Va.	39	..	..	..	..
Charleston, W. Va.	39	..	..	..	..
Norfolk, Va.	22	..	..	..	..
Decatur, Ill.	..	35	..	..	..
Indianapolis, Ind.	[9] 32	32	35	35	..
Evansville, Ind.	..	[7] 32	..	..	..
Centralia, Ill.	..	35	..	..	..
Cheyenne, Wyo.	..	25	..	..	..
Omaha, Nebr.	..	30	..	..	..
Chillicothe, Mo.	..	31	..	..	..
Bismarck, Mo.	..	[7] 32	..	..	..
	Memphis Baton Rouge New Orleans			Greenville Baton Rouge	
Joplin, Mo.	22	..	..	..	..
Hopkinsville, Ky.	25	..	25	..	..
Corinth, Miss.	17	..	..	..	..
Clarksdale, Miss.	..	..	..	12	..

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SECTION 15

Between Biloxi, Miss., and—	Via Twin Cities New Orleans	St. Louis Cairo New Orleans	Iowa ports [1] New Orleans	Louisville New Orleans	Peoria New Orleans
Fargo, N. Dak.	34	23	..	..	..
Rhinelander, Wis.	32	22	..	..	..
Mason City, Iowa	..	23	32	..	..

	Cincinna New Orleans		Evansville New Orleans		
Milwaukee, Wis.	..	34	..	..	29
South Bend, Ind.	[1] 29	23	27	27	29
Grand Rapids, Mich.	29	23	27	27	29
Saginaw, Mich.	29	23	..	25	..
Cleveland, Ohio	29	20	..	25	..
Detroit, Mich.	29	20	..	25	..
Columbus, Ohio	29	..	..	25	..
Charleston, W. Va.	29	..	..	..	..
Parkersburg, W. Va.	29	..	..	..	..
Cheyenne, Wyo.	..	25	..	..	..
Omaha, Nebr.	..	26	..	..	..
Chillicothe, Mo.	..	23	..	..	..
Decatur, Ill.	..	23	..	..	..
Indianapolis, Ind.	[1] 21	21	23	23	..
Centralia, Ill.	..	21	..	..	..
Evansville, Ind.	..	[1] 22	..	..	..

	Memphis New Orleans	Mobile Port Birmingham			
Hopkinsville, Ky.	17	..	..	..	..
Knoxville, Tenn.	..	20	..	..	..

SECTION 16

Between Salina, Kans., and—	Via Kansas City St. Louis	Kansas City Cairo
Atlanta, Ga.	16	..
Columbus, Ga.	..	22

SECTION 17

Between Cheyenne, Wyo., and—	Via Kansas City St. Louis	Kansas City Cairo
Atlanta, Ga.	14	..
Columbus, Ga.	..	18

Footnotes on p. 641.

[fols. 78-79]

SECTION 19

Between Omaha, Nebr., and—	Via Kansas City St. Louis	Kansas City Cairo	Kansas City Memphis
Atlanta, Ga.	15	..	..
Columbus, Ga.	..	20	..
Meridian, Miss.	..	..	20

	Via Kansas City Vicksburg	Kansas City New Orleans	
Brookhaven, Miss.	25	..	..
Biloxi, Miss.	..	24	..

SECTION 20

Between Denver, Colo., and—	Via Kansas City St. Louis
Cincinnati, Ohio	20

[1] Dubuque, Clinton, and Burlington, Iowa, and Rock Island, Ill.
[2] Prescribed for application only to and from points in Wisconsin and Arkansas.
[3] Not prescribed for application to and from points in Oklahoma or Kansas.
[4] Not prescribed for application to and from points in Oklahoma or Texas.
[5] Not prescribed for application to and from points in Texas west of Fort Worth and south of Corsicana.
[6] Not prescribed for application to and from points in Alabama and Florida.
[7] Via Cairo only.
[8] Not prescribed for application to and from points in Michigan.
[9] Not prescribed for application to and from points west of the line of the Pennsylvania Railroad Company between Louisville, Ky., and South Bend, Ind.

[fols. 80-81] EXHIBIT No. 3

Supplemental Report of the Commission Dated June 13, 1949, in

Rail and Barge Joint Rates

Docket No. 26712

[fol. 82] EXHIBIT No. 3 TO COMPLAINT

Interstate Commerce Commission

No. 26712

Rail and Barge Joint Rates

Decided June 13, 1949

Upon further consideration, finding in prior report, 270 I.C.C. 591, with respect to prescribed rail-barge commodity rates from New Orleans, La., modified. Order entered requiring establishment of prescribed through routes and joint rail-and-barge rates.

Supplemental Report of the Commission

MILLER, Commissioner:

In our original report, 270 I.C.C. 591, we found the establishment of through routes and joint rates for barge-and-rail transportation of property in connection with certain water carriers on the Mississippi and Warrior rivers, their navigable tributaries, and connecting waterways to be necessary and desirable in the public interest and prescribed differentials which we found to be justified between all-rail rates and the joint rates in connection with the water carriers. Entry of an order was deferred in order that the respondent carriers might have an opportunity to consider whether they would voluntarily establish routes and rates in substantial compliance with our findings. They have since advised us that they are unwilling to do so.

[fol. 83] A petition for modification of our findings has been filed by certain commercial organizations at Galveston and Houston, Tex. This petition relates to finding No. 2

(p. 619) involving commodity rates, which contained a proviso that it—

> shall not require the establishment of barge-and-rail commodity rates from New Orleans, La. to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such destination from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans.

The petitioners ask that this proviso be modified so as to make it applicable also to rates to New Orleans as a destination. This criticism is sound, and the finding will be modified accordingly. Petitioners further urge that the finding be further modified so as to exclude rates between New Orleans and inland points where the short-line rail distance between such inland point and Houston is not greater than the constructive distance between New Orleans and the same point determined by adding to the short-line rail distance between such point and the port of interchange the "rail equivalent" of the barge service between that port and New Orleans. It is suggested that this equivalent be expressed in constructive rail miles which would be equated water miles. There is no evidence in the record upon which such an equation could be accurately determined, and we do not regard [fol. 84] the proposed restriction as feasible or desirable. Nor do we see any necessity for including class rates in the proviso, as petitioners ask. Finding 2 is therefore amended to read as follows:

> 2. We find that joint commodity rates (not including commodities in bulk) from and to points referred to in appendix A and appendix B over lines of the aforesaid respondents should be established in amounts which would bear the same ratio to the all-rail commodity rates from and to the same points as that between the first class all-rail rate and the first-class barge-and-rail rate from and to the same points, and that the differences between the all-rail and barge-and-rail commodity rates so established would be justified as differentials; provided, however, that this finding

shall not affect the present barge-and-rail rates on sugar, in carloads, and shall not require the establishment of barge-and-rail commodity rates between New Orleans and an interior point which shall be lower than the rate on the same commodity between Houston or Galveston and the same interior point where the short-line rail distance between such point and Houston or Galveston is not greater than the short-line rail distance between the same point and the port of interchange in the barge-and-rail route to or from New Orleans.

In appendix A to our report setting forth the prescribed differentials there were a few inadvertent omissions. Our findings are therefore corrected to include the following differentials in addition to those shown:

Between Greenville, Miss., and Grand Rapids, Mich., via Peoria, Ill., 30 cents; via St. Louis, Mo., or Cairo, Ill., 27 cents.

[fol. 85] Between Cairo, Ill., and Corpus Christi, Tex., via New Orleans or Baton Rouge, La., 30 cents.

Between Mobile, Ala., and Mason City, Iowa, via St. Louis or Cairo, 27 cents.

Between Vicksburg, Miss., and South Bend, Ind., via Peoria, 34 cents.

An order in conformity with our findings will be entered.

Commissioners Splawn, Patterson, Johnson, and Cross did not participate in the disposition of this proceeding.

[fols. 86-87] EXHIBIT No. 4

Order of the Commission Dated October 8, 1934, Instituting the Investigation in Rail and Barge Joint Rates, Docket No. 26712

[fol. 88] EXHIBIT No. 4 TO COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of October, A. D. 1934.

No. 26712

Rail and Barge Joint Rates

No. 13290

THE SECRETARY OF WAR, OPERATING MISSISSIPPI-WARRIOR SERVICE

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY et al.

No. 18406

INLAND WATERWAYS CORPORATION, OPERATING MISSISSIPPI-WARRIOR SERVICE

v.

BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY et al.

No. 19017

INLAND WATERWAYS CORPORATION

v.

CHICAGO GREAT WESTERN RAILROAD COMPANY et al.

No. 19480

INLAND WATERWAYS CORPORATION, OPERATING MISSISSIPPI-WARRIOR SERVICE et al.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY et al.

[fol. 89] No. 26679

BALTIMORE & OHIO RAILROAD COMPANY et al.

v.

AMERICAN BARGE LINE COMPANY

No. 26680

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY et al.

v.

INLAND WATERWAYS CORPORATION

No. 26681

ALTON RAILROAD COMPANY et al.

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY

No. 26592

MISSISSIPPI VALLEY BARGE LINE COMPANY

v.

ABERDEEN & SOUTHERN RAILWAY COMPANY et al.

The Commission having under consideration the subject of through routes and joint rates, rules, regulations, and practices for application by common carriers by railroad and by common carriers by water operating on the Mississippi and Warrior Rivers and their tributaries, and a petition having been filed by common carriers by railroad, parties to the above-entitled proceedings in Nos. 13290, 19017, 19480, and 18406, by which said petitioners ask that said proceedings be reopened for rehearing, and be reheard, with the hearing upon the pending complaints in above Nos. 26679, 26680, and 26681, filed by petitioners, and a further complaint in above No. 26592 having been filed, and for good cause appearing:

It is ordered, That an investigation be, and it is hereby, instituted by the Commission, upon its own motion, in above No. 26712, into and concerning the reasonableness [fols. 90-91] and lawfulness otherwise of existing through routes and joint rates, rules, regulations, and practices for application by common carriers by railroad and by

common carriers by water operating upon the Mississippi and Warrior Rivers and their tributaries; the reasonableness of existing minimum differentials between all-rail rates and corresponding rail-barge, barge-rail, and rail-barge-rail rates; the necessity, if any, for the establishment by the aforesaid common carriers by railroad and by water of additional through routes and joint rates, rules, regulations, and practices; and for the fixing of reasonable minimum differentials if any, between the corresponding all-rail rates and any such additional through routes and joint rates; with the view to making such findings in the premises and prescribing such just, reasonable, and otherwise lawful joint rates, rules, regulations, and practices and such reasonable minimum differentials, if any, as the facts and circumstances shall appear to require.

It is further ordered, That all common carriers by railroad and by water participating in the joint rates hereinabove referred to be, and they are hereby, made respondents to the proceeding in No. 26712, and that a copy of this order be served upon each of said respondents.

It is further ordered, That Nos. 13290, 18406, 19017, and 19480, be, and they are hereby, reopened for further hearing and, together with Nos. 26679, 26680, 26681, and 26592, consolidated for disposition with No. 26712.

And it is further ordered, That these proceedings be assigned for hearing at such times and places as the Commission shall hereafter direct.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 92] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—Filed October 28, 1949

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division:

I

Galveston Chamber of Commerce, Houston Port and Traffic Bureau and Railroad Commission of Texas, under Rule 24 of Rules of Civil Procedure, hereby move the Court

for an order permitting them to intervene as plaintiffs in this action, so that they may make and establish the claims set forth in the proposed complaint pleading attached hereto.

II

Your movants were parties at interest in a proceeding before the Interstate Commerce Commission, Docket No. [fol. 93] 26712, out of which this court action arose, and under the Judicial Code, 28 U. S. C. § 2323, they may intervene as a matter of right, by orderly and appropriate procedure, and be represented by counsel in this court proceeding. The pertinent portion of the Judicial Code is quoted below for convenience:

> The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.
>
> The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

III

Wherefore, Your movants pray that an order be entered permitting them to intervene in this action.

Respectfully submitted, Wm. A. Disque, Attorney for Movants.

October 20, 1949.

Wm. A. Disque, 70 Rust Building, 1001 Fifteenth Street, N. W., Washington 5, D. C.

Resident Counsel, Wayne M. Hoffman, 135 East Eleventh Place, Chicago 5, Ill.

6—45-48

[fol. 94] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENORS' COMPLAINT—Filed October 28, 1949

I

Galveston Chamber of Commerce is a voluntary non-profit organization incorporated under the laws of the State of Texas, with its principal office and place of business at 2021 Market Street, Galveston, Texas. Its membership consists of persons, firms, corporations and others engaged in the business of handling various commodities in domestic and foreign water-borne commerce. It has for its object and purpose the protection and welfare of its members and the city of Galveston, especially as a port, including, as a primary function, protection against unlawful freight [fol. 95] rates.

II

Houston Port and Traffic Bureau is a corporation without capital stock and not operated for a profit. Its principal office is in the Cotton Exchange Building, Houston, Texas. Fifty percent of its budget is supplied by the Harris County Houston Ship Canal and Navigation District, a political sub-division of the State of Texas. Its functions are similar in all essential details to those of the traffic department of a chamber of commerce, such as that at Galveston. Its constituents are local interests concerned with the protection and welfare of Houston as a port.

III

Railroad Commission of Texas, with offices at Austin, Texas, is a body duly established by the Constitution and Statutes of the State of Texas to investigate and prescribe rates, fares and charges for intrastate application within that State for common carrier railroads operating therein, and is charged with the added duty of representing the sovereign State of Texas and the interests of its people in proceedings involving interstate rates. It is here concerned primarily with the protection and welfare of both Galveston and Houston as ports.

IV

The above named parties were parties at interest in the case before the Interstate Commerce Commission mentioned in the next succeeding paragraph out of which this court action arose and upon their motion are intervenors here under authority of the Judicial Code, 28 U. S. C. § 2323, and an order of this court.

V

Various railroad carriers on September 20, 1949, instituted the above-entitled action in this Court to contest the [fol. 96] validity of, and to avoid compliance with, the order of the Interstate Commerce Commission in its Docket No. 26712, entitled *Rail and Barge Joint Rates,* which proceeding is covered by an original report, 270 I. C. C. 591, dated July 7, 1948, and a supplemental report, 274 I. C. C. 229, dated June 13, 1949. In said Docket No. 26712 the Commission prescribed a system of differentials to be deducted from all-rail rates to make joint rates for the through transportation of freight partly by rail and partly by barge, hereinafter called rail-barge rates, from and to various points in the country, and on June 13, 1949, ordered them to be established by the carriers on or before November 1, 1949, and thereafter maintained. The effective date of the order was on September 27, 1949, changed by a Commission order to December 31, 1949.

VI

The Commission, in prescribing and ordering the rates in No. 26712, acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. § 907 (d), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

The Commission construed this provision as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether

there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The record showed that the costs to the carriers were at least as great via rail-barge as via all-rail. The Commission said [fol. 97] in its original report that it could not find that there were demonstrable economies in the rail-barge service which would justify differentials (P. 606) and it appears that the prescription of differentials rests solely upon the supposed Congressional mandate. (P. 609-613) The railroads felt that the Commission's construction of the law was in error and in violation of the National Transportation Policy stated in an introductory paragraph of the Interstate Commerce Act, and that the differentials were not "justified" by the evidence. They accordingly instituted this court action, alleging that the Commission's decision was arbitrary, capricious, unconstitutional and otherwise unlawful, and prayed that the Commission's decision and order be set aside.

VII

The intervenors hereinbefore named support in full the position taken by the railroad plaintiffs in their complaint in this court action and concur in all the contentions therein made. Accordingly, under authority of Rule 10(c) of the Rules of Civil Procedure, these interveners adopt, by reference, paragraphs VII to XVIII, inclusive, on pages 6 to 16, inclusive, of that complaint, together with the exhibits attached thereto, and rely upon them as if incorporated herein. However, these interveners have several special grounds of complaint in addition to the general grounds set forth in the railroads' complaint. The interveners' special grounds arise out of the fact that the interests represented by the interveners would suffer legal wrong and be adversely affected by the unlawfully prescribed differentials for rates between New Orleans, La., and interior points west of the Mississippi River. The unlawful prescription of these differentials is a final congressional-agency action for which there is no adequate remedy except an injunction as hereinafter prayed for. The differentials are named in the second, third and fourth blocks of points in the first [fol. 98] column on page 622 of the original report. (Copied on page 52 of the railroads' complaint). Taking northbound traffic for illustration, the rail-barge rates would apply by

common-carrier barge up the Mississippi River from New Orleans to some river landing north thereof and thence by rail. The river landing, or port, where the freight is transferred from barge to railroad car, would perhaps generally be Memphis, Tenn., but could be any one of about a dozen landings on the Mississippi River north of New Orleans specified in connection with the differentials in the Commission's report, dependent upon the location of the destination and the route beyond the transfer point. The interveners will now proceed to state their special grounds of complaint.

VIII

Galveston and Houston are ports of entry and egress for water-borne traffic (export, import, coastwise and intercoastal) handled in competition with New Orleans, which traffic originates at, or is destined to, interior points west of the Mississippi River. The rail-barge rates which the Commission prescribed between New Orleans and the interior points, in arbitrary disregard of its statement that it could not find demonstrable economies in the rail-barge service, would artificially afford competitive advantages for New Orleans interests, while depriving Houston and Galveston interests of their inherent advantages of location and subjecting them to grave injustice and serious injury, all in violation of section 3(1) of the Interstate Commerce Act, 49 U. S. C. § 3(1), which prohibits undue preference and prejudice. Galveston and Houston interests thus fall within the statements made in section XVI, on page 15, of the railroads' complaint in this court proceeding.

IX

The interveners complain that the Commission failed [fol. 99] adequately to recognize and evaluate their evidence, and likewise the railroads' general evidence insofar as it affects rail-barge transportation between New Orleans and the interior points west of the Mississippi River; and failed to make proper and necessary findings of fact and state its conclusions on the issues presented. The Commission was arbitrary. The evidence of record called for findings and conclusions that rates such as were prescribed between New Orleans and the interior points would be unduly preferential of New Orleans and unduly prejudicial

to Galveston and Houston interests, in violation of Section 3(1) of the Interstate Commerce Act, 49 U. S. C. § 3(1); and that such rates would bear an unreasonable relation to the rates between Galveston and Houston, on the one hand, and the interior points on the other, and be below reasonable minima, in violation of Section 1 (5)(a) of that Act; also the Commission failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for rail-barge rates. The Commission's reports and its order therefore lack findings and conclusions essential to their constitutional and statutory validity. For these reasons the rates prescribed lawfully could not have been required. In fact, because ambiquity in the findings and order, it is impossible to say exactly what rates the Commission did undertake to require.

X

Finding 2 in the Commission's supplemental report, after prescribing that rail-barge commodity rates shall be related to the corresponding class rates by the use of a given percentage formula, contains the following restriction:

> • • • provided, however, that this finding • • • shall not require the establishment of barge-and-rail commodity rates between New Orleans and an interior point which shall be lower than the rate on the same commodity between Houston or Galveston and the same [fol. 100] interior point where the short-line rail distance between such point and Houston or Galveston is not greater than the short-line rail distance between the same point and the port of interchange in the barge-and-rail route to or from New Orleans.

This proviso makes finding 2 arbitrary, and therefore unlawful, because it undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure. The cost of the through rail-barge haul with relation to the cost of the all-rail haul should be determinative.

XI

Finding 1 is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, al-

though the necessity for a limitation on the entire differential system is recognized in principle by the proviso in finding 2.

XII

The provision of Section 307 (d), quoted in paragraph VI of this complaint, is, if the Commission's construction and application thereof be correct, unconstitutional, because it violates Article 1, Section 9, Clause 6, of the Constitution of the United States, which reads in part as follows:

> No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; • • •

XIII

By reason of the unconstitutional, arbitrary, capricious, and unlawful action of the Commission in entering its order of June 13, 1949, as to the prescribed rail-barge rates between New Orleans and the interior points west of the Mississippi River, the interveners are left without an adequate remedy at law and will be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

[fol. 101] Wherefore, the interveners pray:

(1) That, after no less than five days' notice to the Attorney General of the United States, the United States Attorney, and such other persons as may be defendants, the Court, after hearing, by interlocutory injunction enjoin and restrain enforcement of the order of the Commission as to the prescribed rail-barge rates between New Orleans and points west of the Mississippi River pending final hearing and determination of this suit; and

(2) That, upon final hearing of this cause, the Court adjudge that the order of the Interstate Commerce Commission is predicated upon an unconstitutional statutory provision, or a misconstruction of the Interstate Commerce Act, unlawful, beyond the power of the Commission, arbitrary, capricious, without rational basis, unsupported by essential findings, and contrary to and without support in the evidence; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation, and execution of said order as to the rates referred to in the next preceding paragraph hereof; and

that interveners have such further relief as may be deemed proper by the Court.

Respectfully submitted, Wm. A. Disque, Attorney for Interveners.

October 20, 1949.

Wm. A. Disque, 70 Rust Building, 1001 15th St., N. W., Washington 5, D. C.

Resident Counsel, Wayne M. Hoffman, 135 East Eleventh Place, Chicago 5, Ill.

[fols. 102-103] CERTIFICATE

I hereby certify that copies of the foregoing motion to intervene as plaintiffs and the accompanying interveners' complaint were today mailed, postage prepaid, to The Honorable J. Howard McGrath, Attorney General of the United States, Department of Justice, Washington 25, D. C., to the Honorable Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington 25, D. C., and to Harold E. Spencer, attorney for the railroad plaintiffs, 135 East Eleventh Place, Chicago 5, Ill.

Wm. A. Disque.

October 20, 1949.

[fols. 104-105] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—October 28, 1949

On motion of Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas, by counsel, it is

Ordered that leave be and it is hereby granted to the said Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas, to intervene herein

[fol. 106] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—Filed October 28, 1949

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division:

I

The Savannah Sugar Refining Corporation, under Rule 24 of Rules of Civil Procedure, hereby moves the Court for an order permitting it to intervene as plaintiff in this action so that it may make and establish the claims set forth in the proposed complaint pleading attached hereto.

II

Your movant was a party in the proceeding before the [fol. 107] Interstate Commerce Commission Rail and Barge Joint Rates, I. C. C. Docket No. 26712, 270 I. C. C., 591, and 274 I. C. C. 229, in which proceeding said Commission entered the Order here at issue.

It is provided in Title 28, Section 2323 of the District Court Jurisdiction Act, approved June 25, 1948, that any party in intreest to the proceeding before the Commission, in which an order or requirement is made, "may appear as parties of their own Motion and as of right, and be represented by Counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

This movant takes the position before this Court as has been set forth in its pleading herewith; and seeks the relief from the Court as is shown therein. This is consistent with the position of movant before the Interstate Commerce Commission in the proceeding before the Commission here at issue before the Court.

Wherefore, movant prays that it be permitted to intervene in this cause as a party plaintiff so that it may make and establish the claims set forth in the accompanying complaint.

C. R. Hillyer, Attorney for Movant. 135 South La-Salle Street Chicago 3, Illinois.

October 28, 1949

[fol. 108] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENER'S COMPLAINT—Filed October 28, 1949

I

The Savannah Sugar Refining Corporation is engaged in the refining of imported and domestic cane sugar at Port Wentworth, Georgia, adjacent to Savannah, Georgia. Its product, refined sugar, is transported by rail in carloads to consuming markets in all of the States of the Southeast, and also to destinations in states North of the Ohio river, covered by the order of the Interstate Commerce Commission here under attack. Said order is the result of a proceeding before the Interstate Commerce Commission, *Rail and Barge Joint Rates*, I. C. C. Docket No. 26712, reported in 270 I. C. C. 591, and 274 I. C. C. 229. Intervener was a party to the proceeding before the Interstate Commerce [fol. 109] Commission above described, and has filed a petition of intervention under authority of the Judicial Code 28 U. S. C. Section 2323.

II

This is a suit to enjoin, set aside, annul and suspend the above mentioned order of the Interstate Commerce Commission. A copy of the order of the Commission, a copy of the Commission's report of July 7, 1948, and a copy of its supplemental report of June 13, 1949 are attached to the complaint of the railroads herein.

III

The decision of the Commission in No. 26712 purports to rest upon authority conferred upon it in Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. 907(d), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint

rates in connection with such common carrier by water."

IV

The Commission construed the above clause as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there was any demonstrable economy in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions, although the commission found that there were no demonstrable economies in barge-rail service which would justify differentials.

V

[fol. 110] This intervener supports the position taken by the railroad plaintiffs in their complaint in this court action and concurs in the contentions therein made. Accordingly, under authority of Rule 10(c) of the Rules of Civil Procedure, this intervener adopts, by reference, paragraphs VII to XVIII, inclusive, on pages 6 to 16, inclusive, of that complaint, together with the exhibits attached thereto, and relies upon them as if incorporated herein.

VI

Intervener sets forth certain special grounds that pertain to it as a distributor of sugar via all-rail routes and paying thereon rail rates, in competition with sugar transported from New Orleans via barge-rail routes and paying differential barge-rail rates lower than the rail rates.

VII

The prescription of differentials in favor of joint rail-barge routes which are not justified by demonstrable economies in the rail-barge service gives to shippers of sugar who are in a position to ship via the rail-barge routes, an arbitrary and unfair advantage in reaching competitive markets, over other shippers of sugar such as intervener who are not in a position to use rail-barge service but who do have available all-rail routes over which the traffic can be moved at a lesser cost than over the competing rail-barge routes. Thus shippers who have available to them the lower cost all-rail routes are deprived of this inherent

advantage by the arbitrary rate differential imposed on them by the Commission. Such action by the Commission is unlawful in that it subjects all-rail shippers including this intervener to undue and unreasonable prejudice and disadvantage and gives to rail-barge shippers an unjust and [fol. 111] unreasonable preference and advantage in violation of Section 3(1) of the Interstate Commerce Act; and results in relatively unreasonable and unlawful existing relationships between joint barge-rail rates and all-rail rates, and in unreasonably low rates, all in violation of Section 1 of the Act to regulate Commerce.

VIII

The all-rail rates on sugar in carloads from the refinery of this intervener located at Port Wentworth, Georgia, and the all-rail rates on sugar in carloads from competing refineries, in the New Orleans district, to the markets involved in this proceeding, have all been fixed and determined by the Commission as just, reasonable and lawful rates in and of themselves; and said all-rail rates from and to said points also have been fairly related by the Commission the one to the other, and free from unjust discrimination, as required by the Interstate Commerce Act, for the respective transportation services for all-rail transportation. Therefore arbitrarily lower differential rail-barge rates from the New Orleans District to said competitive markets, which are not justified by demonstrable economies in the rail-barge service or other transportation circumstances and conditions, result in unduly preferential rates to refiners located in the New Orleans district, and unlawful prejudice to this intervener which is forced to pay the higher all-rail rates, in violation of Section 3(1) of the Act to regulate Commerce; and results in relatively unreasonable and unlawful existing relationships between joint barge-rail rates and all-rail rates, and in unreasonably low rates, all in violation of Section 1 of the Act to regulate Commerce.

[fols. 112-113] IX

The decision of the Commission refers to Sugar traffic as of "outstanding importance". Thus, this intervener is the outstanding victim of the existing barge-rail differential rates. In absorbing the difference between

the all-rail rates and the differential barge-rail rates, the cost to intervener on shipments to three Southeastern states alone, up to the time of the hearing before the Commission, amounted to $464,133.00. The Commission states that its decision "shall not affect the present barge-rail rates on sugar". The order of the Commission provides that the reports are a part thereof. While this finding is negative in form it is affirmative in substance, and arbitrarily authorizes the continuation of differential barge-rail rates under a misconception of the provisions of the Transportation Act of 1940, as pointed out elsewhere herein.

Wherefore, intervener prays:

(1) That, after not less than five days' notice to the Attorney General of the United States, the United States Attorney, and such other persons as may be defendants, the Court, after hearing, by interlocutory injunction, enjoin and restrain enforcement of the order of the Commission pending final hearing and determination of this suit.

(2) That, upon final hearing of this cause, the Court adjudge that the order of the Interstate Commerce Commission is predicated upon a misconstruction of the Interstate Commerce Act, unlawful, beyond the power of the Commission, arbitrary, capricious, unsupported by essential findings, and contrary to and without support in the evidence; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation, and execution of said order; and that intervener have such further relief as may be deemed proper by the Court.

Respectfully submitted, C. R. Hillyer, Attorney for Intervener, Savannah Sugar Refining Corporation.
135 South LaSalle Street, Chicago 3, Illinois.

October 28, 1949.

[fols. 114-115] In the United States District Court

[Title omitted]

Order Allowing Intervention—October 28, 1949

This cause coming on to be heard on the motion of the Savannah Sugar Refining Corporation for leave to intervene as a party thereto, and the Court having considered said motion, and it appearing to the Court that said Savannah Sugar Refining Corporation should be permitted

to intervene as prayed, and the Court being fully advised in the premises,

It is ordered that said Savannah Sugar Refining Corporation has leave to intervene in this cause, and is hereby made a party to this cause, and to that end may be represented by counsel, be heard at oral argument and file brief in the same manner and with like effect as if named an original party to this cause.

Igoe, United States District Judge.

[fols. 116-117] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING CAUSE FOR HEARING—October 28, 1949

On motion of the plaintiffs by counsel it is

Ordered that hearing herein be and it is hereby set for December 15, 1949.

[fols. 118-119] IN UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF THREE-JUDGE COURT—Filed November 4, 1949

The undersigned Chief Judge of the Court of Appeals for the Seventh Circuit, having been notified by Honorable Michael L. Igoe, United States District Judge for the Northern District of Illinois, Eastern Division, of an application for injunction and other relief in the above entitled cause, does hereby, pursuant to Sec. 2284 of the Revised Judicial Code, designate the Honorable Walter C. Lindley, a Circuit Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable Philip L. Sullivan, a United States District Judge for the Northern District of Illinois, Eastern Division, to serve as members of a three-judge district court to hear and determine the above-designated action or proceeding now set for hearing on Thursday, December

15, 1949, at 10 a. m., and for such further time as may be required.

Dated this 3rd day of November, 1949.

J. Earl Major, Chief Judge, United States Court of Appeals for the Seventh Circuit.

[fols. 120-121] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

INTERVENTION OF THE INTERSTATE COMMERCE COMMISSION—Filed November 7, 1949

To the Honorable the Judges of Said Court:

In accordance with the provisions of Section 2323, Title 28, U. S. Code, we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

Daniel W. Knowlton, Chief Counsel. Edward M. Reidy, Associate Chief Counsel, for Interstate Commerce Commission, 3315 Interstate Commerce Commission Bldg., Washington 25, D. C.

[fol. 122] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed November 7, 1949

The Interstate Commerce Commission, intervening defendant in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I, II and III of the complaint, the Commission admits the same, except

that the Commission alleges that the supplemental report of June 13, 1949, referred to in paragraph III of the complaint, is reported in 274 I. C. C. 229.

[fol. 123]

II

Answering the allegations of paragraph IV of the complaint, the Commission admits the same, except the Commission denies that the effect of its order is to compel plaintiffs and other common carriers by railroad to give up to their competitors certain traffic which would normally move via all-rail routes in the absence of such lower or so-called differential joint rail-barge rates as the Commission has prescribed.

III

Answering the allegations of paragraphs V, VI and VII of the complaint, the Commission admits the same.

IV

Answering the allegations of paragraphs VIII, IX, and X of the complaint, the Commission admits the issuance by it of the reports and order therein referred to, to which this Commission refers the court for a more full and complete statement as to its findings and conclusions than is contained in said paragraphs.

V

Answering the allegations of paragraph XI of the complaint, the Commission denies the same.

VI

Answering the allegations of paragraph XII of the complaint, the Commission admits that the provisions of the National Transportation Policy and of Section 307(d) of the Interstate Commerce Act, are correctly set forth in said paragraph. The Commission denies that in its original [fol. 124] or supplemental report herein, it has misconstrued any provision of the Interstate Commerce Act or any other law under which it operates, and denies that the Commission's prescription of differentials in favor of the rail-barge routes is based solely upon supposed congressional mandate. The Commission avers in this connection that its prescription of differentials in favor of the rail-

barge routes is based upon a consideration of the entire record before it in this proceeding as explained in its report of July 7, 1948 and its supplemental report of June 13, 1949, Exhibits Nos. 2 and 3 to the Bill of Complaint, to which reference is hereby made. The Commission further denies that its order is invalid for any other reason set forth in said paragraph.

VII

Answering the allegations of paragraph XIII of the complaint, the Commission denies that its order is unlawful, beyond its power, arbitrary and capricious for any reason set forth in said paragraph or for any other reason.

VIII

Answering the allegations of paragraph XIV of the complaint, the Commission denies that its prescription of differentials in favor of joint rail-barge routes is contrary to the National Transportation Policy of Congress, and that its said decision "will not promote adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers but will have just the opposite effect and will result in unfair and destructive competitive practices, all in violation of the National Transportation Policy."

[fol. 125] IX

Answering the allegations of paragraphs XV and XVI of the complaint, the Commission denies that its prescription of differentials in favor of joint rail-barge routes, as required by its order herein, is arbitrary, without any rational basis in fact, and unreasonable in violation of Section 1 of the Interstate Commerce Act, or that such action by the Commission is unlawful as subjecting all-rail shippers to undue and unreasonable prejudice and disadvantage, and gives to rail-barge shippers an undue and unreasonable preference and advantage in violation of Section 3(1) of the Interstate Commerce Act. In this connection the Commission alleges that questions of violations of Sections 1 and 3 of the Act are administrative in nature which, if supported by substantial evidence, are within the exclusive determination of the Interstate Commerce Commission.

X

Answering the allegations of paragraph XVII of the complaint, the Commission denies that its reports of July 7, 1948 and June 13, 1949 do not contain sufficient findings to support its conclusions, and further denies that its action described in said paragraph is arbitrary, capricious or beyond its power, and unlawful or void.

XI

Answering the allegations of paragraph XVIII of the complaint, the Commission denies the same.

XII

Answering the allegations of paragraph XIX of the complaint, the Commission denies that plaintiffs are subject to irreparable damage by reason of its reports and order [fol. 126] herein, and further denies that said reports and order are arbitrary or capricious or beyond its lawful authority.

Answering the allegations of the complaint, the Commission admits and alleges that in the proceedings in Docket No. 26712, involved in this suit, the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said reports and order of July 7, 1948 and June 13, 1949, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiffs herein by their counsel; that at said hearings and subsequently, in briefs filed in said proceedings, and in oral argument before the Commission, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the plaintiffs herein, its said reports and order of July 7, 1948, and June 13, 1949, annexed to and made parts of the complaint; that said reports and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the

Commission made the findings and stated the conclusions upon which its said reports and order were based.

The Commission further alleges that the findings and conclusions of said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

[fol. 127] The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further alleges that said reports and order of July 7, 1948 and June 13, 1949 were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said reports and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said reports and order are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said order causes, or will cause plaintiffs either irreparable damage or any damage if said reports and order are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and order referred to and made parts of the complaint as Exhibits 2 and 3.

[fol. 128] All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by: Edward M. Reidy, Associate Chief Counsel,

Daniel W. Knowlton, Chief Counsel, of Counsel.

[fols. 129-130] *Duly sworn to by Charles D. Mahaffie, jurat omitted in printing.*

[fol. 131] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT—Filed November 14, 1949

The Interstate Commerce Commission, intervening defendant in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the intervening complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

[fol. 132]

I

Answering the allegations of paragraphs I to V, inclusive, of the intervening complaint, the Commission for the purposes of this case, admits the same.

II

Answering the allegations of paragraph VI of the intervening complaint, the Commission refers the Court to its reports of July 7, 1948 and June 13, 1949, made parts of the original complaint, to show the authority the Commission relied upon in support of its action herein attacked. The Commission denies that it construed Section 307(d) of the Interstate Commerce Act as a statement of congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The Commission further denies that the prescription of differentials rests solely upon the supposed congressional mandate, as alleged in said paragraph VI. The Commission avers in this connection that its prescription of differentials in favor of the rail-barge routes is based upon a consideration of the entire record before it in this proceeding as explained in its report of July 7, 1948 and its supplemental report of June 13, 1949, Exhibits Nos. 2 and 3 to the Bill of Complaint, to which reference is hereby made.

Further answering the other allegations of paragraph VI of the intervening complaint, the Commission admits that the record showed that the costs to the carriers were at least as great by rail-barge as by all-rail. The Commission further admits that the railroads instituted a court action, as described in said paragraph VI.

[fol. 133] III

Answering the allegations of paragraph VII of the intervening complaint incorporating by reference paragraphs VII to XVIII, inclusive, of the railroads' original bill of complaint, the Commission adopts paragraphs III to XI, inclusive, of its answer to the railroads' bill of complaint, as its answer to the allegations of paragraph VII of the intervening complaint.

The Commission denies that intervening plaintiffs suffered legal wrong as a result of the Commission's order herein and in this connection the Commission alleges that intervening plaintiffs are by this suit endeavoring to offset disadvantages of their locations in that they are not situated on waterways to or from which the joint barge-rail rates have been prescribed. The Commission denies that it has unlawfully prescribed these differentials, as alleged in paragraph VII, and denies that its order is invalid for any reason set forth in said paragraph or for any other reason.

IV

Answering the allegations of paragraph VIII of the intervening complaint, the Commission denies the same, and the Commission further alleges that any question as to a violation of Section 3(1) of the Interstate Commerce Act is an administrative question which, if supported by substantial evidence, is within the exclusive determination of the Interstate Commerce Commission and with which this Court has no concern.

V

Answering the allegations of paragraph IX of the intervening complaint, the Commission denies the same.

[fol. 134] VI

Answering the allegations of paragraph X of the intervening complaint, the Commission admits that its report

herein contains a percentage formula containing the restriction set forth in said paragraph X. The Commission expressly denies the other allegations of said paragraph X.

VII

Answering the allegations of paragraphs XI, XII and XIII of the intervening complaint, the Commission denies the same. The Commission further denies that intervening plaintiffs are subject to irreparable damage by reason of its reports and order herein, and denies that said reports and order are arbitrary, capricious or beyond its lawful authority.

Answering the allegations of the intervening complaint, the Commission admits and alleges that in the proceedings in Docket No. 26712, involved in this suit, the parties thereto, including the intervening plaintiffs herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said reports and order of July 7, 1948 and June 13, 1949, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of intervening plaintiffs herein by their counsel; that at said hearings and subsequently, in briefs filed in said proceedings, and in oral argument before the Commission, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by intervening plaintiffs in this suit, whereupon the Commission determined said matters and entered [fol. 135] and served upon all the parties to said proceedings, including the intervening plaintiffs herein, its said reports and order of July 7, 1948, and June 13, 1949, annexed to and made parts of the railroads' complaint; that said reports and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which its said reports and order were based.

The Commission further alleges that the findings and conclusions of said reports were and are, and that each of them

was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the intervening complaint herein.

The Commission further alleges that said reports and order of July 7, 1948 and June 13, 1949 were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them, that in making said reports and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the intervening complaint. The Commission denies that its said reports and order are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said intervening complaint, or for any other reason or reasons. The [fol. 136] Commission denies that its said order causes, or will cause intervening plaintiffs either irreparable damage or any damage if said reports and order are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and order referred to and made parts of the railroads' complaint as Exhibits 2 and 3.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, By: Edward M. Reidy, Associate Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fols. 137-138] *Duly sworn to by Charles D. Mahaffie: Jurat omitted in printing.*

[fol. 139] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENING COMPLAINT—Filed November 14, 1949

The Interstate Commerce Commission, intervening defendant in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the intervening complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

[fol. 140] I

Answering the allegations of paragraphs I and II of the intervening complaint, the Commission for the purposes of this case, admits the same.

II

Answering the allegations of paragraph III of the intervening complaint, the Commission refers the Court to its reports of July 7, 1948 and June 13, 1949, made parts of the original complaint, to show the authority the Commission relied upon in support of its action herein attacked. The Commission admits that the provisions of Section 307(d) of the Interstate Commerce Act are correctly set forth, but only in part, in said paragraph.

III

Answering the allegations of paragraph IV of the intervening complaint, the Commission denies that it construed Section 307(d) of the Interstate Commerce Act as a statement of congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The Commission avers in this connection that its prescription of differentials in favor of the rail-barge routes is based upon a consideration of the entire record before it in this proceeding as explained in its report of July 7,

1948 and its supplemental report of June 13, 1949, Exhibits Nos. 2 and 3 to the Bill of Complaint, to which reference is hereby made.

[fol. 141] Further answering the other allegations of paragraph IV of the intervening complaint, the Commission admits the same.

IV

Answering the allegations of paragraph V of the intervening complaint incorporating by reference paragraphs VII to XVIII, inclusive, of the railroads' original Bill of Complaint, the Commission adopts paragraphs III to XI, inclusive, of its answer to the railroads' Bill of Complaint, as its answer to the allegations of paragraph V of the intervening complaint.

V

Answering the allegations of paragraph VI of the intervening complaint, the Commission denies that intervening plaintiff suffered legal wrong as a result of the Commission's order herein and in this connection the Commission alleges that intervening plaintiff is by this suit endeavoring to offset disadvantages of its location in that it is not situated on waterways over which joint rail-barge rates are applicable.

VI

Answering the allegations of paragraph VII of the intervening complaint, the Commission denies that its action is unlawful in that it subjects all-rail shippers including this intervener to undue and unreasonable prejudice and disadvantage and gives to rail-barge shippers an unjust and unreasonable preference and advantage in violation of Section 3(1) of the Interstate Commerce Act; and results in relatively unreasonable and unlawful existing relationships between joint barge-rail rates and all-rail rates, and in unreasonably low rates, all in violation of Section 1 of [fol. 142] the Act to Regulate Commerce. The Commission further alleges that any question as to violation of Section 1 or Section 3(1) of the Interstate Commerce Act are administrative questions which, if supported by substantial evidence, are within the exclusive determination of the Interstate Commerce Commission and with which this Court has no concern.

VII

Answering the allegations of paragraph VIII of the intervening complaint, the Commission denies that lower differential rail-barge rates from the New Orleans District to competitive markets, which are not justified by demonstrable economies in the rail-barge service or other transportation circumstances and conditions, result in unduly preferential rates to refiners located in the New Orleans district, and unlawful prejudice to this intervener which is forced to pay the higher all-rail rates, in violation of Section 3(1) of the Act to Regulate Commerce, and results in relatively unreasonable and unlawful existing relationships between joint barge-rail rates and all-rail rates, and in unreasonably low rates, all in violation of Section 1 of the Act to Regulate Commerce. The Commission further alleges that any questions as to violations of Sections 1 and 3(1) of the Interstate Commerce Act are administrative questions which, if supported by substantial evidence, are within the exclusive determination of the Interstate Commerce Commission and with which this Court has no concern.

VIII

Answering the allegations of paragraph IX of the intervening complaint, the Commission denies that its findings herein authorizes the continuation of differential barge-rail rates under a misconception of the provisions of the Trans-
[fol. 143] portation Act of 1940. The Commission disclaims information sufficient to form a belief as to the truth of the allegations of costs as claimed in said paragraph IX.

Answering the allegations of the intervening complaint, the Commission admits and alleges that in the proceedings in Docket No. 26712, involved in this suit, the parties thereto, including the intervening plaintiff herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said reports and order of July 7, 1948 and June 13, 1949, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of intervening plaintiff herein by its counsel; that at said hearings and sub-

sequently, in briefs filed in said proceedings, and in oral argument before the Commission, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by intervening plaintiff in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the intervening plaintiff herein, its said reports and order of July 7, 1948, and June 13, 1949, annexed to and made parts of the railroads' complaint; that said reports and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which its said reports and order were based.

[fol. 144] The Commission further alleges that the findings and conclusions of said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the intervening complaint herein.

The Commission further alleges that said reports and order of July 7, 1948 and June 13, 1949 were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them, that in making said reports and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the intervening complaint. The Commission denies that its said reports and order are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said intervening complaint, or for any other reason or reasons. The Commission denies that its said order causes, or will cause intervening plaintiff either irreparable damage or any damage if said reports and order are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the intervening complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and order referred to and made parts of the railroads' complaint as Exhibits 2 and 3.

[fols. 145-146] All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening complaint be dismissed.

Interstate Commerce Commission, By: E. M. Reidy, Associate Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

Duly sworn to by Charles D. Mahaffie. Jurat omitted in printing.

[fol. 147] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed November 21, 1949

Now comes the United States of America, defendant, and for answer to the complaint of plaintiffs filed in the above entitled action admits, denies and avers as hereinafter set forth.

1. Answering the allegations in paragraph I, the United States, on information and belief, admits the same.

2. Answering the allegations in paragraphs II and III, the United States admits the same and, for further answer, avers that the Interstate Commerce Commission's supplemental report referred to in paragraph III is reported in 274 I.C.C. 229.

3. Answering the allegations in paragraph IV, the United States admits the same, except the allegation contained in the penultimate sentence thereof, which the United States denies.

4. Answering the allegations in paragraph V and VI, the United States admits the same.

5. Answering the allegations in paragraph VII, the United States admits the same but respectfully refers the Court to Exhibit No. 4 of the complaint for the complete text of the Commission's order entered October [fol. 148] 8, 1934.

6. Answering the allegations in paragraphs VIII, IX and X, the United States admits the occurrence of the procedural steps therein described including the issuance by the Commission of the reports and order therein referred to, to which the Court is respectfully referred for full and complete information as to the findings and conclusions made by the Commission.

7. Answering the allegations in paragraph XI, the United States denies the same.

8. Answering the allegations in paragraph XII, the United States denies all conclusions therein set out to the effect that the Commission's order is beyond the authority of the Commission, unlawful and void, and based upon a misconception of law or the provisions of the Interstate Commerce Act.

9. Answering the allegations in paragraphs XIII through XVI, inclusive, the United States denies that the Commission's order is invalid, arbitrary, capricious, or in any manner unlawful for any reason stated in said paragraphs or for any reason whatsoever.

10. Answering paragraph XVII, the United States admits that the Commission, in Appendices A and B to its report, prescribed a large number of specific differentials to be deducted from the all-rail rates to determine the joint rail-barge rates, but as to each and every other allegation in said paragraph, the United States denies the same.

11. Answering the allegations in paragraph XVIII, the United States denies the same.

12. Answering the allegations in paragraph XIX, the United States denies that plaintiffs will be subjected to irreparable damage or any injury in law if the relief prayed for in the complaint is not granted.

13. For further answer to plaintiffs' complaint, the United States avers that the report and order herein as-

sailed were made and issued within the Commission's statutory authority upon substantial evidence after full [fols. 149-150] and fair hearing and that the report and order are lawful and valid in all respects. Defendant, United States, denies that said report and order are invalid for the reasons assigned in plaintiffs' complaint or for any reason whatsoever.

Wherefore, having fully answered the complaint, the United States prays that the relief therein prayed for be denied and the complaint dismissed, with costs to plaintiffs, and that defendant, United States, have the benefit of such other and further orders, decrees or relief as may be just and proper.

William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D.C., Attorney for the United States of America, Defendant.

James E. Kilday, Special Assistant to the Attorney General; Herbert A. Bergson, Assistant Attorney General; Otto Kerner, Jr., United States Attorney.

CERTIFICATION OF SERVICE

I certify that a true copy of the foregoing Answer was served by mailing this 15th day of November, 1949, to counsel for all parties of record.

William J. Hickey, Special Assistant to the Attorney General.

November 15, 1949.

[fol. 151] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA TO COMPLAINT OF INTERVENING PLAINTIFFS—Filed November 21, 1949

Now comes the United States of America, defendant, and for answer to the complaint of intervening plaintiffs filed in the above entitled action admits, denies and avers as hereinafter set forth.

1. Answering the allegations in paragraphs I, II and III, the United States on information and belief admits the same.

2. Answering the allegations in paragraphs IV and V, the United States admits the same.

3. Answering the allegations in paragraph VI, the United States admits those contained in the last two sentences thereof. Answering the remaining allegations in said paragraph, the United States admits that there is contained therein a correct quotation from a portion of Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. 907 (d). The United States denies that the Commission construed the aforesaid quoted portion of Section [fol. 152] 307(d) as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any transportation circumstances or conditions. The United States denies that said paragraph adequately sets forth the authority conferred upon or relied upon by the Commission to support its action attacked in this cause.

4. Answering the allegations in paragraph VII, the United States adopts paragraphs 5 to 11, inclusive, of its Answer to the complaint of railroad plaintiffs herein as its answer to the first two sentences of said paragraph. Answering the remaining portions of said paragraph, the United States avers that the same fail to set forth any allegations requiring an answer, but for further answer to said paragraph, the United States denies any inference or conclusion to the effect that enforcement of the Commission's order will cause irreparable injury or any injury in law to intervening plaintiffs.

5. Answering the allegations in paragraph VIII, the United States denies that the provisions of the Commission's order are in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1).

6. Answering the allegations in paragraph IX, the United States denies all conclusions therein to the effect that the provisions of the Commission's order are in violation of Section 1(5)(a) of the Act, that the Commission's report and order lack findings and conclusions essential to their constitutional and statutory validity, and that the Commission's action is otherwise arbitrary or capricious.

7. Answering the allegations in paragraphs X, XI and XII, the United States denies that the Commission's order is invalid or unlawful for any reason stated in said paragraphs or for any reason whatsoever.

8. Answering the allegations in paragraph XIII, the [fols. 153-154] United States denies that enforcement of the Commission's order will cause intervening plaintiffs irreparable injury or any injury in law.

9. For further answer to complaint of intervening plaintiffs, the United States avers that the report and order herein assailed were made and issued within the Commission's statutory authority upon substantial evidence after full and fair hearing and that the report and order are lawful and valid in all respects. Defendant, United States, denies that said report and order are invalid for the reasons assigned in the complaint of intervening plaintiffs or for any reason whatsoever.

Wherefore, having fully answered the complaint of intervening plaintiffs, the United States prays that the relief therein prayed for be denied and the complaint dismissed, with costs to plaintiffs, and that defendant, United States, have the benefit of such other and further orders, decrees or relief as may be just and proper.

William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D.C., Attorney for the United States of America, Defendant.

James E. Kilday, Special Assistant to the Attorney General; Herbert A. Bergson, Assistant Attorney General; Otto Kerner, Jr., United States Attorney.

CERTIFICATION OF SERVICE

I certify that a true copy of the foregoing Answer was served by mailing this 15th day of November, 1949, to counsel for all parties of record.

William J. Hickey, Special Assistant to the Attorney General.

November 15, 1949.

[fol. 155] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA TO COMPLAINT OF INTERVENING PLAINTIFF—Filed November 21, 1949

Now comes the United States of America, defendant, and for answer to the complaint of intervening plaintiff filed in the above entitled action admits, denies and avers as hereinafter set forth.

1. Answering the allegations in paragraph I, the United States on information and belief admits the same.

2. Answering the allegations in paragraph II, the United States admits the same.

3. Answering the allegations in paragraph III, the United States admits said paragraph contains a correct quotation of a portion of Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. 907(d). The United States denies that said paragraph adequately sets forth the authority conferred upon or relied upon by the Commission to support its action attacked in this cause.

4. Answering the allegations in paragraph IV, the United [fol. 156] States denies that the Commission construed the therein described clause forming a part of the aforesaid Section 307(d) as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there was any demonstrable economy in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. For full and complete information concerning the basis for the Commission's action, the Court is respectfully referred to the Commission's reports of July 7, 1948 and June 13, 1949, attached to the railroad plaintiffs' complaint herein as Exhibit Nos. 2 and 3.

5. For answer to paragraph V, the United States adopts paragraphs 5 to 11, inclusive, of its Answer to the complaint of the railroad plaintiffs filed in this action.

6. Answering paragraph VI, the United States avers that the same fails to set forth any allegation requiring an answer. For further answer to said paragraph the United

States denies that enforcement of the Commission's order will cause irreparable injury or any inury in law to intervening plaintiff.

7. Answering the allegations in paragraphs VII, VIII and IX, the United States denies that the Commission's order creates unreasonable prejudice and disadvantage or unjust and unreasonable preference or that it is invalid or unlawful in any manner whatsoever for any reason set forth in said paragraph or for any reason whatsoever.

8. For further answer to complaint of intervening plaintiff, the United States avers that the report and order herein assailed were made and issued within the Commission's statutory authority upon substantial evidence after full and fair hearing and that the report and order are lawful and valid in all respects. Defendant, United States, denies that said report and order are invalid for the reasons assigned in the complaint of intervening plaintiff or for any reason whatsoever.

Wherefore, having fully answered the complaint of inter-
[fols. 157-158] vening plaintiff, the United States prays that the relief therein prayed for be denied and the complaint dismissed, with costs to plaintiff, and that defendant, United States, have the benefit of such other and further orders, decrees or relief as may be just and proper.

William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Attorney for the United States of America, Defendant. James E. Kilday, Special Assistant to the Attorney General; Herbert A. Bergson, Assistant Attorney General; Otto Kerner, Jr., United States Attorney.

CERTIFICATION OF SERVICE

I certify that a true copy of the foregoing Answer was served by mailing this 15th day of November, 1949, to counsel for all parties of record.

William J. Hickey, Special Assistant to the Attorney General.

November 15, 1949.

[fols. 159-160] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—Filed November 23, 1949

Come now American Barge Line Company; Inland Waterways Corporation, doing business as Federal Barge Lines; and Mississippi Valley Barge Line Company, to move that they be permitted to intervene and become parties, as intervening defendants, in the above-entitled cause, as of right under the provisions of § 2323, Title 28, U. S. Code, and Rule 24 of the Federal Rules of Procedure; and said parties further move that they be permitted to file forthwith their pleading tendered herewith.

Samuel H. Moerman, Investment Bldg., Washington, D. C.; Harry C. Ames, Transportation Bldg., Washington, D. C.; Robert N. Burchmore, John S. Burchmore, Nuel D. Belnap, 2106 Field Bldg., Chicago, Ill.; Attorneys for Movants.

[fol. 161] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PLEADING OF INTERVENING DEFENDANTS—Filed November 23, 1949

I

The American Barge Line Company is a common carrier by water subject to the Interstate Commerce Act, as amended, and to the jurisdiction of the Interstate Commerce Commission. It is a respondent in the Interstate Commerce Commission proceeding known as *Rail and Barge Joint Rates, No. 26712,* in which the Commission entered the order and requirement which is complained of by plaintiffs in the above-entitled suit.

II

Inland Waterways Corporation, doing business as Federal Barge Lines, is a common carrier by water subject to the Interstate Commerce Act, as amended, and to the jurisdiction of the Interstate Commerce Commission. It is a re-

spondent in the Interstate Commerce Commission proceeding known as *Rail and Barge Joint Rates, No. 26712,* in which the Commission entered the order and requirement which is complained of by plaintiffs in the above-entitled suit; and it, or its predecessor in interest, is the complainant in Interstate Commerce Commission dockets Nos. 13290, 18406, 19017, and 19480, which are embraced in the report of the Commission of July 7, 1948, in *No. 26712.*

III

Mississippi Valley Barge Line Company is a common carrier by water subject to the Interstate Commerce Act, as amended, and to the jurisdiction of the Interstate Commerce Commission. It is a respondent in the Interstate Commerce Commission proceeding known as *Rail and Barge Joint* [fols. 162-163] *Rates, No. 26712,* in which the Commission entered the order and requirement which is complained of by plaintiffs in the above-entitled suit.

IV

The above named interveners were and are parties in interest to the said proceeding before the Commission in which an order or requirement was made.

V

Said interveners support the order and requirement made by the Commission in the proceeding before it; and they deny that the Commission, in entering said order and requirement, erred; or misconstrued the law; or acted arbitrarily, capriciously, and unlawfully; or contrary to and without support in the evidence; or without support in necessary preliminary findings in making its ultimate findings set forth on page 619 of its report as quoted in Paragraph VIII of the complaint of the plaintiffs herein.

All of which matters and things the above named interveners are ready to aver, maintain and prove as this honorable court shall direct, and hereby prays the complaints of the plaintiffs and of intervening plaintiffs be dismissed.

Samuel H. Moerman, Investment Bldg., Washington, D. C.; Harry C. Ames, Transportation Bldg., Washington, D. C.; Robert N. Burchmore, John S. Burchmore, Nuel D. Belnap, 2106 Field Bldg., Chicago, Ill., Attorneys for Interveners.

[fols. 164-165] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—November 23, 1949

Upon consideration of a motion for intervention filed by American Barge Line Company; Inland Waterways Corporation, doing business as Federal Barge Line; and Mississippi Valley Barge Line Company; and good cause appearing therefor;

It is ordered, That the above-named movants be and they are hereby permitted to intervene and become parties to the above-entitled cause; and that the pleading of said interveners tendered with said motion be filed forthwith.

Igoe, Judge.

Dated at Chicago, Illinois, November 23, 1949.

[fols. 166-167] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—Filed November 28, 1949

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division:

I

Come now the Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau and the New Orleans Traffic and Transportation Bureau to move that they be permitted to intervene and become parties as intervening defendants in the above-entitled cause, as of right under the provisions of § 2323, Title 28 U. S. Code and Rule 24 of the Federal Rules of Procedure; and said parties further move that they may be permitted to file their pleading tendered herewith.

Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, New Orleans Traffic and Transportation Bureau, by Louis A. Schwartz, Attorney for Movants.

New Orleans, La., November 23, 1949.

Resident Counsel: William J. Fanning, 2106 Field Building, Chicago 5, Illinois.

Louis A. Schwartz, 408 International Building, 611 Gravier Street, N. O. La.

[fol. 168] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENING DEFENDANTS—Filed November 28, 1949

Come now the Baton Rouge Traffic Bureau, Inc., the Memphis Freight Bureau, and the New Orleans Traffic and Transportation Bureau and respectfully say:

I

That the Baton Rouge Traffic Bureau, Inc., successor to Baton Rouge Chamber of Commerce, Traffic Bureau, is a non-profit organization organized under the laws of the State of Louisiana representing the port, commercial and civic interests of the City of Baton Rouge and the Port of Baton Rouge in all matters pertaining to transportation, with its principal office in the Municipal Docks Building, Baton Rouge, La. Among the membership are included the following: City of Baton Rouge, Baton Rouge Chamber of Commerce, Port of Baton Rouge, Baton Rouge Port Development Association and over sixty of the leading industrial and business firms located in Baton Rouge, La.

The Memphis Freight Bureau is a voluntary, nonprofit membership corporation, incorporated under the laws of the State of Tennessee, whose membership is composed of shippers and receivers of freight, located at Memphis, Tenn., or in Shelby County, Tenn., including manufacturers, [fol. 169] jobbers, distributors, wholesalers, retailers, utilities, and others. Its membership also includes banks and civic and trade bodies located in Memphis, also the Memphis and Shelby County Commission. The bureau is maintained for the purpose of protecting and fostering the interests of its members and the community of Memphis and Shelby County, Tenn., in all matters pertaining to transportation of freight. Its principal office is in the Peabody Hotel, Memphis, Tennessee.

The New Orleans Traffic and Transportation Bureau, successor to the New Orleans Joint Traffic Bureau is a nonprofit organization organized under the laws of the State of Louisiana representing the port, commercial, industrial and civic interests of the city and port of New Orleans in all matters pertaining to transportation. Among the mem-

bership of the bureau are included the following: Board of Commissioners of the Port of New Orleans; New Orleans Chamber of Commerce (Successor to the New Orleans Association of Commerce); New Orleans Steamship Association, New Orleans Cotton Exchange, Green Coffee Association of New Orleans; New Orleans Board of Trade, Ltdo; New Orleans Warehousemans' Association; The American Sugar Cane League; Grain, Sugar and Rice interests, as well as individual industrial and commercial organizations.

II

Your movants were parties in interest in a proceeding before the Interstate Commerce Commission Docket 26712, known as *Rail and Barge Joint Rates* in which the Interstate Commerce Commission entered the order and requirement which is complained of by plaintiffs and intervening plaintiffs in the above-entitled proceeding.

That movants were parties in interest in the proceeding before the Interstate Commerce Commission mentioned in the foregoing paragraph out of which this court action arose and upon their motion are interveners herein under authority of the Judicial Code 28 U. S. Code, § 2323, and [fols. 170-171] an order of this Honorable Court.

Interveners, Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau and the New Orleans Traffic and Transportation Bureau support the order and requirement made by the Interstate Commerce Commission in the proceeding before it. Interveners deny that the Commission in entering said order and requirement erred; or mis-construed the law; or acted arbitrarily, capriciously and unlawfully; or contrary to and without support in the evidence; or without support in necessary preliminary findings in making its ultimate findings set forth on page 619 of its report as quoted in paragraph VIII of the complaint of complainants herein. Interveners further deny that the said report and order of the Interstate Commerce Commission are invalid for the reasons assigned in plaintiffs complaint or in intervening complainants' complaints, or for any reason whatsoever.

All of which matters and things the above-named interveners are ready to aver, maintain and prove as this Honorable Court shall direct and prays that the complaints of the plaintiffs, and of intervening plaintiffs, be dismissed.

Louis A. Schwartz, Attorney for Interveners

— Certificate

I certify that a true copy of the foregoing answer was served by mailing this 25th day of November, 1949, to counsel for all parties or record.

Louis A. Schwartz, Attorney for Interveners.

Louis A. Schwartz, 408 International Building, 611 Gravier Street, New Orleans 12, La.

Resident Counsel: William J. Fanning, 2106 Field Building, Chiacgo 5, Illinois.

[fols. 172-173] In the United States District Court

[Title omitted]

Order Granting Leave to Intervene—November 28, 1949

Upon consideration of motion for intervention filed by the Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau and the New Orleans Traffic and Transportation Bureau, and good cause appearing therefor:

It is ordered that the above named movants be and they are hereby permitted to intervene and become parties to the above-entitled cause and that the pleading of said interveners tendered with said motion be filed forthwith.

Igoe, Judge.

Dated at Chicago, Illinois, November 28, 1949.

[fols. 174-175] In the United States District Court

[Title omitted]

Notice of Hearing—Filed November 30, 1949

To:

Honorable J. Howard McGrath, Attorney General, Washington, D. C.

Mr. Otto Kerner, Jr., U. S. District Attorney, 450 U. S. Court House, Chicago, Ill.

Mr. Daniel W. Knowlton, Chief Counsel,

Mr. Edward M. Reidy, Associate Chief Counsel, Interstate Commerce Commission, Washington 25, D.C.

Mr. Samuel H. Moerman, Investment Building, Washington, D.C.

Mr. Harry C. Ames, Transportation Building, Washington, D.C.

Mr. Robert N. Burchmore, Mr. John S. Burchmore, Mr. Nuel D. Belnap, 2106 Field Building, Chicago, Ill., Attorneys for intervening defendants, American Barge Line Company, Inland Waterways Corporation, d/b/a Federal Barge Lines, and Mississippi Valley Barge Line Company.

Mr. Louis A. Schwartz, 408 International Building, 611 Gravier St., New Orleans 12, La.

Mr. William J. Fanning, 2106 Field Building, Chicago 5, Ill., Attorneys for intervening defendants, Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, and New Orleans Traffic and Transportation Bureau.

Pursuant to the provisions of Title 28 U. S. Code § 2284, you are hereby notified that the above-entitled cause has been set for hearing on Thursday, December 15, 1949, at 10:00 A.M., before the Honorable Walter C. Lindley, Circuit Judge, the Honorable Philip L. Sullivan, District Judge, and the Honorable Michael L. Igoe, District Judge, in the court room of Judge Igoe, United States Court House, Clark and Adams Streets, Chicago, Illinois.

Roy H. Johnson, Clerk United States District Court, Northern District of Illinois.

November 30, 1949.

[fols. 176-177] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO SHOW REPRESENTATION—Filed December 13, 1949

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division:

I

The Railroad Commission of Texas, by and through Price Daniel, Attorney General of Texas, respectfully moves the Court to permit the record to show that the Railroad Commission of Texas, which has heretofore intervened herein

as co-interveners with Galveston Chamber of Commerce and Houston Port and Traffic Bureau, is represented herein by the Attorney General of Texas by and through his Assistant Charles E. Crenshaw. In this connection, the Railroad Commission of Texas adopts the intervention motion and intervention complaint in their entirety.

It is respectfully requested that the names of Price Daniel, Attorney General of Texas, and Charles E. Crenshaw, Assistant Attorney General of Texas, be added to said motion and complaint.

Respectfully submitted, Price Daniel, Attorney General of Texas, Charles E. Crenshaw, Assistant Attorney General.

[fols. 178-179] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—December 13, 1949

On motion of Price Daniel, Attorney General of the State of Texas, it is

Ordered that leave be and it is hereby given to the said Price Daniel, to appear of record for the Railroad Commission of Texas in this cause.

[fols. 180-181] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL, Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL, Defendants

TRANSCRIPT OF PROCEEDINGS—Filed March 24, 1950

Had in the above-entitled cause before the Honorable Walter C. Lindley, Michael L. Igoe, and Philip L. Sullivan, constituting a three-judge district court, at Chicago, Illinois, on December 15, 1949.

Mr. Harold E. Spencer, appeared on behalf of plaintiffs;
Mr. William J. Hickey, appeared on behalf of the United States;

Mr. Edward M. Reidy, appeared on behalf of the Interstate Commerce Commission;

[fol. 182] Mr. William A. Disque, appeared on behalf of Galveston Chamber of Commerce and Houston Port and Traffic Bureau and Railroad Commission of Texas,

Mr. Harry C. Ames, appeared on behalf of Mississippi Valley Barge Line Company,

Mr. Nuel D. Belnap, appeared on behalf of Inland Waterways Corporation doing business as Federal Barge Lines,

Mr. Samuel H. Moerman, appeared on behalf of American Barge Line Company,

Mr. Louis A. Schwartz, appeared on behalf of Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, New Orleans Traffic and Transportation Bureau,

Mr. C. R. Hillyer, appeared on behalf of Savannah Sugar Refining Corporation.

[fol. 183]

STATEMENT

Judge Lindley: Gentlemen, before we proceed let me say on behalf of the Court that we are pleased to have, in accord with our suggestion, very complete and thorough briefs supplied by the respective parties. We have examined those and from them we think we have got some understanding, at least, of the issues that are involved here.

We think that one of the important issues is whether the Commission may enter an order for reasonable rates without any consideration of the respective costs of the services that are involved.

We understand that the plaintiff insists that, although these respective costs are not the sole pertinent factor to be considered, they are at least so important a factor, under the Commission's own rulings and under Court rulings, that the Commission cannot validly act without giving some consideration to them.

And, furthermore, that the plaintiff insists there are not sufficient basic findings of fact to support the ultimate conclusions of law of the Commission. That in turn, of course, involves the question of how far the Commission must go in making evidentiary findings of fact to support its conclusion.

[fol. 184] Those two issues it seems to us are highlighted in the briefs of the respective parties.

We understand further that certain other collateral issues, questions of law, are involved of course in connection with those issues; we understand that plaintiffs take the position that, even though this order provides that the differential which is fixed between barge-rail routes and all-rail routes is to be assumed by the barge lines, that fact in itself does not protect them because their competitive position as rail carriers is handicapped and their inherent advantages as rail carriers are ignored.

There are certain interveners here, interveners plaintiffs and interveners defendants, I suppose we may term them: Those interveners who are aligned with the Commission, these barge lines, take a position largely that of the Commission and of the Government. The intervening defendants, as we understand it, are largely interested because they claim that discrimination is made against them by the order that has been entered.

[fol. 185] Now we have not meant to mention all of the issues that are presented, but we have said what we have said to indicate what we think are the high spots of what is before us. We say that preliminary to the question we now wish to put to counsel and that is how much time is required on each side, considering the fact that you have filed very helpful and informative briefs, and considering that there should not be any repetition of argument. We ask you candidly how much time do you think should be allotted for this hearing.

Mr. Spencer: My name is Harold Spencer, your Honor, I represent the plaintiffs in the action. We have no evidence to offer except the certified copy of the record before the Commission. We had originally asked the Court to allow one and a half hours for our side and the defendants wanted the same time, but in view of the statement of the Court and the fact we do not have to discuss the facts in the case, but confining our argument to the points you have mentioned, I think perhaps at the outside an hour on our side will be sufficient.

Mr. Caruso: If the Court please, may I introduce at this time the Special Assistant Attorney General who [fol. 186] will argue the case before your Honors, Mr. William J. Hickey, and also Mr. Edward M. Reidy who is

Associate Chief Counsel of the Interstate Commerce Commission, and Senior Counsel, of course.

They will represent the United States of America.

Judge Lindley: From the Department of Justice?

Mr. Caruso: That is right.

Mr. Hickey: Your Honor, we had originally planned to split up this argument equally between counsel for the Government and counsel for the barge lines. We think counsel for the barge lines are in an excellent position to help in the presentation of this matter because counsel have lived with this case during this long period of time from day to day.

We had originally planned to occupy about an hour and a half; it will be difficult, from our original plans, to shorten that a great deal.

Judge Lindley: Well, it is the concensus of opinion of the Judges that in view of what we have read you ought to get through with an hour on a side. We are not going to cut off your head, of course, if you happen to go beyond that.

Judge Igoe: Who is to speak for the barge lines?

[fol. 187] Mr. Hickey: They are represented, your Honor, by Mr. Harry Ames, representing the Mississippi Valley Barge Lines, Mr. Nuel Belnap, representing the Federal Barge Lines, Mr. S. H. Moerman, representing the American Barge Lines, and Mr. Louis A. Schwartz, another intervening defendant representing certain ports on the Mississippi.

Judge Lindley: Of course the barge lines argument is exactly the same as that of the Government and the Commission, is it not?

Mr. Hickey: It is not contrary to it, your Honor. Of course you appreciate this special interest in this matter.

Judge Lindley: Well, they have very full and complete briefs here. We will try to get through with an hour on a side, dividing your time as you see fit.

Mr. Spencer: Before proceeding with the case, your Honor, I would like to introduce Mr. William A. Disque of the District of Columbia Bar and move his admission for the purposes of this case.

Judge Lindley: He may be admitted without further formality for the disposition of this case.

[fol. 188] ARGUMENT BY MR. SPENCER:

Mr. Spencer: If the Court please, we would like to offer in evidence for the plaintiffs a certified copy of the record of this proceeding before the Commission. It is packed in eight boxes behind the bench and in the boxes are contained the record of testimony and exhibits and I have in my hand certified copies of the oral argument before the Commission, the Examiner's proposed reports, the reports of the Commission, the Commissioner's orders and I suggest it all be marked Exhibit 1.

Judge Lindley: Very well.

(Which said documents, so offered and received in evidence, were thereupon marked Plaintiffs' Exhibit No. 1.)

Mr. Spencer: I think the defendants have no evidence to offer, is that not correct?

Mr. Hickey: No evidence.

Mr. Spencer: If the Court please, in view of the statement of the Court I shall not discuss any of the facts in the case except very incidentally. I do, however, want to state that our complaint prayed for the issuance of the permanent injunction and an interlocutory injunction and the order has been voluntarily postponed by the Commis-[fol. 189] sion so it will become effective on January 31st, on thirty days' notice; that requires the railroads to file these rates by January 1st or they will be in violation of the order.

I should also like to say I think the principal point in this case is high lighted by the brief of the Department of Justice; they say, on Page 22 of that brief:

> "The Congress has declared that there are inherent economies to the shipping public in barge transportation and that rates must be made in contemplation of this economic fact."

We say that that is the issue in this case. That if Congress has the power to so legislate a fact like that into existence by legislative fiat, and they have done so, then the Commission's order must be upheld. But we think that is not true.

Congress has no such power and they have not done so and have not intended to do so.

The declaration of policy of the Interstate Commerce Act provides that the inherent advantages of all modes of transportation shall be recognized and preserved, and our contention is simply that our lower cost of service is an inherent advantage which is entitled to be recognized [fol. 190] and preserved.

We do not think that the Congress intended, in the Inland Waterways Corporation Act, to state any policy that the barge lines should have any advantage beyond what they are entitled to on the merits of their service and what they are entitled to under the substantive provisions of the Interstate Commerce Act. In that respect I do not think Congress intended to change the substantive provisions of the law in any particular, and we say, in that connection, our case falls squarely within the Ann Arbor case and the New York Central case cited in our briefs, and with that preliminary statement I want to turn to the subject of costs.

The cost evidence before the Commission was reviewed in its report and reviewed briefly in the briefs of the parties and no purpose would be served by reviewing it in detail here, nor would any purpose be served by reviewing the detailed criticisms of the cost evidence which are made by the barge lines, those criticisms were all made before the Commission and the Commission did not take them into consideration at all. Some of them, a good many of them, were made before the restatement of the Commission was made in final form and the cost section of the Commis- [fol. 191] sion did not take those into consideration except to a minor extent, and the Commission paid no attention to them in its final report, and we take the position, therefore, that those detailed criticisms of the costs have no place before the Court and they are foreclosed by the finding of the Commission.

Now the Commission found, and this is the most important finding from our standpoint, "in the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials."

While this finding is stated negatively rather than affirmatively, we regard it as a finding that the record does not

disclose any economies in barge-rail service which would justify the prescription of differentials. The Commission apparently felt that it was unimportant in this case to make a detailed finding with respect to costs, the relative cost of all rail versus barge-rail, in view of the fact that the Commission did not consider costs important in this proceeding. Apparently the Commission considered it sufficient that on the whole record it was clear that the differentials could not be justified by any economies in the barge-
[fol. 192] rail service.

None of the parties before this Court except the Department of Justice ever took the position that this was a stale record and the Department suggests in its brief, on Page 8, that this is not a finding that there are no economies in the service but that was the finding there was insufficient evidence or evidence of insufficient quality to warrant any finding as to the economies of barge-rail transportation.

We do not see how this finding can be so interpreted in the light of the fact one-fourth of this record of over 16,000 pages dealt with cost of service.

We also call attention to the fact that plaintiffs' evidence in this proceeding dealt not with the actual cost of handling any particular traffic or commodities from the standpoint of fixing rates on any particular commodity but dealt with the aggregate cost of all rail traffic versus barge-rail traffic; these cost studies took the actual barge-rail traffic and figured up all the cost of handling that traffic; it assumed the traffic would move all rail and figured the total aggregate cost.

This evidence was submitted to the Commission's cost
[fol. 193] section and was used by them in reporting their conclusion on these costs. They pointed out that the higher costs of barge-rail traffic was due primarily to two things, the high terminal expense of the barge lines and the added terminal handlings required on barge-rail traffic. This joint traffic moves, of course, partly by rail and partly by barge and at the terminal it is required to be taken out of barges and put in rail cars and vice versa.

Now the Department of Justice suggests that this cost evidence is stale and the Commission should not have taken it into consideration in any event. We say it is not stale, because the Commission, having a lot of cost evidence before them, knew what the relative costs were at that time,

and you can see what happened in the meantime, and that this is not a question of finding detailed costs but merely finding relative costs and we say this finding was within their record and within their competence.

We do say if the cost evidence is stale all the other evidence is stale and the Commission had no right to enter any order whatsoever in this proceeding inasmuch as it was a proceeding brought on the Commission's own motion. [fol. 194] Now the defendants say we take the position that differentials must be based on costs and that the Commission and the courts have recognized that rates and differentials do not have to be based solely on costs. We do not take that position and never have.

If these rates and differentials had to be based solely on costs, then there would have to be a differential in favor of the railroads. In all these cases we recognize costs are only one of the factors to be taken into consideration in fixing reasonable rates.

Our position with respect to costs in this case is simply this: our lower cost of service is an inherent advantage which, under the national transportation policy, the Commission is bound to recognize and preserve and that they have no right to take that advantage away from us.

Since the economy of the barge-rail service was actually challenged in this proceeding and since there was a mass of testimony relating to that taken by the Commission, we have taken the position that the Commission was bound to make a finding on that evidence and carry that finding into effect in its report. It is our view that the Commission has [fol. 195] made the finding, which I have quoted, but they have not taken it into consideration in their report.

Defendants also say that it is plaintiffs' position that an affirmative finding of economy is an absolute necessity before they can prescribe differentials. We do not make that contention. We have never made that contention. We merely say in this case that there was evidence on the subject and that the Commission has to make a finding on the evidence and give effect to that finding.

There may be many cases in which no affirmative finding is required for the prescription of differentials. This argument made by the defendants is based upon the statement in the Commission's report that while the Commis-

sion stressed in a number of its earlier reports the lower cost of barge service as an important reason, an important factor or reason for such differentials, in no instance did it decline to prescribe a differential simply because no affirmative finding on which they could base it had been made.

Now that is technically a correct statement but reference to those cases shows that in every one of them the lower cost of the barge service was assumed by the Commission [fol. 196] as justification for the differentials.

In the very first case on this subject, United States War Department versus A. S. Railway Company, 77 ICC 317, which we have quoted extensively from in our brief, that was the case where we quoted the first three general principles that the Commission laid down in that case and I just want to read one sentence from the second finding:

> "We are not persuaded that further rail and barge routes should be established where the degree of circuity would be excessive, nor where the barge lines' share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation."

It is clear in that case the Commission intended to confine the joint routes to routes in which the barge lines added some economy to the route and where their lower costs would not be offset by the added costs of interchange of traffic.

Now it was in this case that the Commission made the statement on which the defendants have heavily relied, in its Principle No. 3, in which the Commission says:

> "The record leads to the conclusion that there are [fol. 197] additional rail and barge routes which would not be open to the objections mentioned above and which ought to be established."

And in connection with these routes the Commission said:

> "So long as the barge line bears the burden of the differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount."

That subject we discussed at considerable length in our briefs and our position on that is simply that it refers only to routes which themselves can be justified by the lower cost of service.

It is merely a divisional matter; that is, of course, if the differentials are justified by the lower cost, the rate should not be based on cost. The barge lines should have a right to suggest that they may be able to get the traffic on a smaller differential than their cost would justify, and in those cases their views are entitled to some weight, but, certainly, if that were a justifying factor in itself, they would always be entitled to differentials, they never could be denied.

[fol. 198] In that same decision the Commission said:

> "As a basic proposition, we accept in the main the principle that rail lines should receive the same revenue as they would receive if the traffic moved all rail via the same gateway."

Now divisions are not involved in this proceeding. As we pointed out in our brief it is not simply a matter of allowing the railroads the same revenue they get on all-rail traffic but of balancing all-rail rates against barge-rail rates and whether there is any reason for a differential, arbitrary differentials.

Now in that same case on further hearing in 92 I.C.C. 528 the Commission said:

> "The service rendered by the barge line in connection with the through traffic in question is not the same as the service performed by an intermediate rail carrier between the same points being both slower and cheaper,"

and they concluded in that case they could establish rail-barge-rail rates in competition with all-rail rates, and I quote:

> "provided the differential fairly reflects the lower cost and value of the barge line service."

We respectfully call the Court's attention that in this [fol. 199] case there is no finding that the differential fairly reflects the lower cost and value of the service.

Judge Lindley: Is there any finding there of the facts as to the difference in cost of barge service and railroad service?

Mr. Spencer: There is not, your Honor, with the exception of the finding I mentioned, in the aggregate——

Judge Lindley: Yes, I mean by that finding.

Mr. Spencer: That is right. We take the position that the Commission could not have made any such finding on the record that they had before them, that these differentials were justified by the lower cost and value of the services.

No doubt the lower value of the services is taken into consideration in the differential, we don't doubt that at all, but our position on that is simply that value shall not be used for fixing differentials, except where the establishment of differentials is justified by other factors, that the lower value in itself is not a justifying factor, because if the Commission undertook to offset the lower value of the barge line service, they would naturally then be compensated for their inherent disadvantages of inferior service which of course would take away the inherent advantages [fol. 200] of its competitors.

We say they could take that into consideration if they have other factors justifying the differentials, but they cannot fix the differentials on the lower value of the services alone.

In the case of Inland Waterways Corporation against the Chicago, Great Western Railroad Company, which is cited at length in the brief of the Commission, the Commission again considered whether it could prescribe rates which were less than reasonable maximum rates, and at the end of the long quotation in the brief, you will find that they again refer to their decision in 92 ICC where they said:

> "The service rendered by the barge line in connection with the through traffic is not the same as the service performed by the intermediate rail carrier, being both slower and cheaper."

They said:

> "In view of this difference in cost and value the portion of the rail-barge-rail joint rate applicable to barge line service may reasonably be less than the cor-

responding portion of all-rail rate applicable to intermediate rail service."

We call the Court's attention again to the fact that there [fol. 201] is no finding except the Commission's own ultimate conclusion that there is any inherent relationship based on the evidence, bearing on any transportation circumstances and conditions, between the rail rates and the barge rail rates.

We have taken the position that the Commission cannot prescribe any rates which are less than maximum reasonable rates. The Commission says it can. I think the point is unimportant here for the reason at least the Commission admits the resulting rates have to be just and reasonable rates. But there is no finding, not even an ultimate finding in the Commission's report that the resulting barge-rail rates are just and reasonable rates, and that was one of the factors specifically covered by the Commission's order instituting this investigation.

It was an investigation into the lawfulness of the differentials, the lawfulness of the resulting barge-rail rates.

It is our position that the rates are not even compensatory, which is shown by the fact that private barge lines won't carry any of the business that Federal carriers get only at a loss.

Judge Lindley: Is it established in the record that the operations of the Federal have always been at a loss?

[fol. 202] Mr. Spencer: The Commission in its report took the operations over the whole period and it shows there have been individual years, very, very few, but there have been individual years in which the Federal has made a profit. But those are few and far between. Its overall operations have been at a loss, and I might say here in connection with this argument that the Federal should have this particular advantage, we say if Congress is going to determine whether or not this has been a fair experiment and whether the Federal is a success or a failure, then they ought to determine it on the basis of the record and not give Federal any arbitrary advantage to which their service does not entitled them.

Judge Lindley: It is a Federal organization?

Mr. Spencer: Yes, it is a United States Government corporation operating under the Secretary of Commerce.

It used to operate under the Secretary of War but it is now in the jurisdiction of the Secretary of Commerce.

In the next case, the Inland Waterways Corporation versus Alabama Great Southern Railroad Company, 151 ICC 126, there are two very important expressions by the Commission. The Commission first says:

> "But here we are asked not to refrain from interfering in what connecting carriers wish voluntarily to [fol. 203] do for competitive reasons, but to compel an unwilling rail carrier to join in new barge rail routes which will compete with existing all rail routes which are amply capable of handling the business. Plainly if we are to accede to such a request, it should appear that the new routes will be reasonably economical."

We respectfully call the Court's attention to the fact that there is no finding in the present case that the new routes will be reasonably economical.

The Commision also went ahead to say:

> "The barge line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, the important fact is the lesser cost of the service, for there can be no justification for encouraging an inferior service having a higher cost."

We think that expression of the Commission makes very clear the issue in this case.

Then in Inland Waterways versus Aberdeen & Rockfish Railroad Company, 183 ICC 761, the Commission said:

> [fol. 204] "The railroads of the country considered as in effect parts of one great system of transportation, are in direct competition for traffic with water lines including the Federal Barge Line. As such competitors, it appears to us that it would be unfair to force them to divert from their rails traffic orginated by them to competitor water lines except in those instances where it can be shown that the services to be performed can be more economically rendered by the water lines than by the rail lines, or where there is some other justifi-

cation other than a mere desire of the water lines to divert traffic from the rails for the sole purpose of increasing their tonnage and securing the revenue accruing therefrom."

And we take the position as illustrated by that case, that we have an inherent advantage in our lower cost of service and that the Commission has no right in reason for depriving us of the benefit of that inherent advantage.

I will not refer to ex parte 96 and related cases discussed in the brief except to say here again the Commis- [fol. 205] sion imposes these circuity and relative service limitations that were for the express purpose of confining these differentials to routes where it was assumed there would be some economy in the service.

I now turn to the question of findings.

We do not raise the question of lack of findings in this case, as a technical formal objection to the report. We raise it as indicative that the Commission has not acted on the evidence of record in this proceeding.

Primarily the question of findings is one not for the parties but for the Court, so that the Court will not have to search through a mass of evidence to find out if the Commission has followed the law. But we say the fact the Commission has not made the proper findings of fact indicates it did not pay any attention to the evidence of record.

Now the barge lines take the position that this is a case where the Commission need only make the ultimate findings, that this Court cannot go behind the Commission's findings. We do not think this contention is in accord with the cases which we cited in our brief and we think they are well summarized in Judge Hand's opinion in the [fol. 206] Baltimore & Ohio case which we cited where he says that what findings are "basic" is a practical matter, and those are such which the Court needs to ascertain on what legal theory the Commission has proceeded.

We do not contend the Commission has to make formal findings in this case, nor do we deny the Commission has before it a mass of technical data and proposals to enable them to figure out the mathematics of the various differentials and how one point should be related to another point and all that sort of thing, but we do say there are no findings at all in this report to indicate on what legal theory

the Commission justified the differentials, except on the sole basis they thought Congressional policy required them to do it.

The Court is not required to speculate on what legal theory the Commission justified the differentials; it is up to the Commission to make clear the rationale of its decision and its order must be tested on the grounds on which it was made.

The Commission specifically excluded the economy of service as justification for the differentials, and it is forbidden to use value of service as justification for the differentials except in combination with lower cost of service. [fol. 207] What then is the theory on which the Commission justified the differentials? There is not the slightest indication in this report that they are justified by the Commission on any grounds except Congressional policy.

Turning to the specific findings suggested by the Department of Justice, you might regard those as typical of the findings on which the defendants rely to support the order.

On Page 23 of its brief it suggested perhaps the most important single finding by the Commission with regard to the measure of differentials, which was that since the barge lines accept the burden of the differential, their views are entitled to important weight, and we do not regard that as a finding of fact. It is not a finding of fact on the evidence.

It is a matter of fact that the barge lines absorb burden of the differentials because they have to but that is a principle established by the Commission in the first of this case, or these cases, and it is not a finding in respect of the evidence before the Commission as justification for the differentials, and it has no bearing whatsoever on the question of justification and furnishes no rational basis for [fol. 208] the Commission's order.

Now in respect to the Department's statement that the proposals of Federal and Valley furnish justification for them, there again the proposals are not evidence of transportation circumstances and conditions, these are just statements of Federal and Valley of what they think is necessary to divert the traffic to them and that in itself cannot furnish a basis for the order.

And then the Commission makes the finding which the Department suggests at the top of Page 25, that Federal once more is struggling with worn out and inadequate facilities. We submit that fact has nothing to do with the

case either, plus the further fact that it is squarely based, is largely based in any event, on Federal's testimony given by the President of the Federal Barge Lines before a Congressional Committee and the Commission has no right to take any ex parte testimony of that sort, to take judicial notice of that in its report and in the findings.

The second suggested finding is that the respondent barge lines reiterate their concurrence in the principle that railroads which are parties to joint barge and rail rates are [fol. 209] entitled to revenues therefrom equivalent to what they would receive from the corresponding all rail rates. Again that is a question of division; we have discussed that already.

Then they go ahead and say Federal is deemed to be performing a pioneering function, for the purpose, among other things, of demonstrating the advantages of joint barge and rail transportation, that it may prove to be economical. It is not for us to say that the experiment should now come to an end. We say that is not a finding of fact, we say it is merely a statement of policy. We submit it is not for the Commission to say that the experiment should or should not come to an end, the Commission's sole duty was to apply the law as it finds it and apply the same principles to the reasonableness and lawfulness of these rates as it would have applied had it not relied on Congressional policy.

Those are the findings which they suggest support this order. There isn't a finding in there based on transportation circumstances and conditions.

The barge lines also suggest or claim that they compared the new differentials with the present differentials but I call [fol. 210] the Court's attention to the fact that the present differentials are involved in this proceeding also and they were established for the most part without a hearing and their lawfulness was under consideration in this case and we do not believe it is proper to use the present differential as a test for the prescription of the new differentials.

We discussed at length in our brief the case of Interstate Commerce Commission versus Mechling. The Department of Justice says that that is all the Commission was doing in this case, was carrying out what the Supreme Court said it was required to do. We do not think that is so. We think the principle in the Mechling case compels a decision in our favor here; that what the Court decided in the case was that low cost of service was an inherent advantage which

the Commission could not take away, it said the Commission had no discretion to take that inherent advantage away, no discretion.

We say if that is the law for the barge lines, it is also the law for the railroad; that we are entitled to fair and impartial regulation.

The Commission did not find that the resulting rates would be just and reasonable, nor did it find that they would [fol. 211] be compensatory. They did not find that they reflected any reasonable relation in cost or other justifying circumstances between the all rail service and barge-rail service and we ask the Court in our suggested findings to find that the Commission has not found the resulting rates were maximum reasonable rates, or not below maximum reasonable rates, and we also request the Court to find that the Commission has not found that the resulting rates would be even just and reasonable.

We think it is very clear in this case that the Commission proceeded on a misconstruction of the law and that its order should be enjoined and set aside.

ARGUMENT BY MR. DISQUE:

Mr. Disque: May it please the Court, my name is William A. Disque; I would like to make it clear that the railroads are not the only ones that have suffered legal wrong under the Commission's decision.

I appear for the Galveston Chamber of Commerce and the Houston Port and Traffic Bureau who have intervened as plaintiffs on behalf of the port interests of Galveston and Houston.

The State of Texas, through its Attorney General or [fol. 212] rather through the Railroad Commission of Texas, also intervened and I understand that the Attorney General has advised that he concurs in the brief filed by the Texas port interests. All three of these interveners were parties to the case before the Commission. They took the same position as the railroads did and they do in this case at this time.

Galveston and Houston are in keen competition with New Orleans as gateways for export and import traffic that comes from and goes to the interior west, between the Rocky Mountains and the Mississippi River.

They would suffer detriment because the differential rail-

barge rates accorded New Orleans would give New Orleans an advantage, an advantage not justified by the facts in this case, as explained by Mr. Spencer. These rates to and from New Orleans apply to traffic moving for instance by barge up the river to Memphis and thence inland by rail.

The Texas interveners are especially concerned about the territory that lies directly, almost directly north of Galveston and Houston, which territory is northwest of New Orleans. The rail distances from New Orleans to that territory are much greater than from Galveston and [fol. 213] Houston.

This territory north of Galveston and Houston is the natural and logical trade territory for the Texas ports, geographically they are entitled to it.

However the Commission in disregard of distance by rail has given New Orleans or at least the railroads have given New Orleans the same rail rates as apply from Galveston and Houston into this territory of the southwest. This is done to offset New Orleans' disadvantage of location in competing with Galveston and Houston in this territory, although practically all other rates in the southwest are made according to distance, that is each shipper ordinarily pays for the transportation he gets. There is no justification that we can find in this record for ordering arbitrary differentials to be deducted from these depressed rail rates.

The rates from New Orleans, all rail, are depressed to meet the rates from Galveston and Houston, yet the Commission has ordered carriers by rail and barge to deduct differentials from the depressed rates. The result is New Orleans gets doubly depressed rates. They get equalization by rail with Galveston and Houston and in addition to [fol. 214] that they get these differentials below the all rail rates.

I will give you an instance, on imported coffee, all rail rates from the three ports, Galveston, Houston and New Orleans to Wichita, Kansas, is seventy cents but the Commission makes the rail-barge rate less by a six cent differential below the rate by rail, which makes the rate from New Orleans for that coffee by barge-rail sixty-four cents as against seventy cents from Galveston and Houston by rail.

Judge Igoe: Well, what is wrong with that?

Mr. Disque: Because there is nothing to justify the barge-rail rates from New Orleans except the policy of Congress, which the Commission has no right to follow unless it has justified in the record.

Judge Igoe: If it was justified, what would be wrong about it?

Mr. Disque: If it was justified we probably wouldn't have as much of a case as we have now, we wouldn't have any case if it was justified, although I do think the differential should be deducted from normal all rail rates instead of depressed all rail rates.

Judge Igoe: If a certain part of the country is so situated that it can take advantage of waterways, why should it not be permitted to do so?

[fol. 215] Mr. Disque: That is all right if they have any justification. In fact, if they have any transportation reason why the barge rates should be lower than all rail rates, I suppose New Orleans is entitled to them. We are not complaining about that. We are complaining about the fact the Commission has given New Orleans barge-rail rates without facts to justify them.

Judge Igoe: You say these facts that are missing as far as justification is concerned, have to do with the cost of operation of the barge lines?

Mr. Disque: Primarily that, yes, it costs them more; I think the record shows it costs more; the Commission finds it costs at least as much to operate the rail-barge route as the all rail route.

We showed the Commission that the Texas port interests had great difficulty in trying to compete with New Orleans in attracting new industries, for instance distributors and exporters and importers who might desire to locate at the Texas ports to serve the southwest territory. We have shown, among other things that Houston coffee interests had found it practically impossible to build up their trade in this natural trade territory directly north of them because of the lower rates from New Orleans, although that [fol. 216] territory north of Galveston and Houston was their natural outlet for coffee if they only had rates that would move it.

We think that it is clear that the purpose and effect of the differential rates is to add traffic to the rail-barge routes and this obviously means that Galveston and Houston will lose much if not most of the traffic that New Orleans

gets. The Galveston and Houston port and business interests would suffer, I think, irreparable injury; we have no way of protecting ourselves except through this Court.

They would suffer injury because of the Commission's action, not only in prescribing these new rail-barge rates for the future but because the Commission failed to raise the present rates from New Orleans to the all rail basis. The Commission prescribed rates from New Orleans some years ago, had no facts to justify what they did. The Dennison Act didn't require facts, and those rates are still in effect.

Now the other side say in their briefs that the grievance of the Texas interveners is due to the disadvantages of location which the Commission has no power to equalize. The fact is that the grievance on the part of the Texas interveners grows out of the rail-barge rates arbitrarily given [fol. 217] New Orleans. These rates give New Orleans an arbitrary advantage and the Supreme Court has repeatedly held that the law does not undertake to equalize unfortunate disadvantages due to unfortunate location. New Orleans is in an unfortunate position, its goods have to move much farther in order to reach this territory. Geographically it is out of this territory.

We say these rates applied from New Orleans result in undue preference for New Orleans and undue prejudice to Galveston and Houston, undue interference and prejudice which is prohibited by Section 3 of the Interstate Commerce Act.

The Commission in effect, by prescribing these rates to and from New Orleans by rail-barge, has really violated the law that it was constituted to enforce. The rail-barge rates from New Orleans and to New Orleans also prefer the State of Louisiana over the State of Texas. They were prescribed in violation of the Constitution of the United States.

The Constitution provides that no preference shall be given by any regulation of commerce to the ports of one state over those of another. This prohibition was to protect the individual states from discrimination by Congress. [fol. 218] In an old Supreme Court case written when people were supposed to know what the Constitution meant, I am referring to Pennsylvania versus Henry and Baltimore Bridge, 18 Howard, 421, the Supreme Court, in that case, said that the provision of the Constitution against preferences of ports, may embrace any description of legislation

looking to the direct privilege or preference of the ports of one state over those of another.

We say Congress may establish ports but having done so it must treat all of them fairly and equally in principle, in the matter of regulation.

We say the Commission construed the differential provision of Section 307 (d) of the Interstate Commerce Act as a mandate to give ports served by inland waterways a differential regardless of transportation conditions. If that section of the law is a mandate, it is unconstitutional, because it means then that states having ports served by inland waterways shall be given an arbitrary and artificial advantage over states not having ports served by inland waterways.

The only way to regard the differential provision of the law as constitutional is to hold that it is not a mandate and that differentials must be justified by transportation conditions.

[fol. 219] Some of these prescribed rates, some of the existing rates between New Orleans and the west apply over vastly circuitous routes. That is, traffic has to move up the Mississippi by barge about seven or eight hundred miles, then inland by rail. The rail distances west of the Mississippi are about as great as rail distances from Galveston and Houston. In other words, after the shipment moves up the Mississippi River seven or eight hundred miles, having got a free ride practically it still has to travel as far west of the Mississippi as it would have had to travel from Galveston or Houston into this territory.

The Commission, by the provision in Finding 2 of its report, undertook to test these rates by a provision, by saying that the rates should be judged by the rail distance alone. We say that is arbitrary. The substance of the provision is that New Orleans is to get a lower rail-barge commodity rate than Galveston and Houston gets, where the rail distances west of the river landir , transfer point, such as Memphis, equals or exceeds th. distance between Galveston and Houston and the interior point.

The Commission said in its final report it had no basis for converting the barge distances into the equivalent of rail [fol. 220] distances, so as to compare one with the other, and I think that is the reason for not correcting this proviso. But the real point is the Commission had no basis for prescribing the rates in the first instance. This whole subject

of limitation of circuitous routes via Memphis or other gateways on the river is rather technical and I will have to ask you to read our brief.

The Commission, Page 60 of its brief, seeks to make a point of the fact the Texas interveners did not file a brief in the case before the Commission. I was not in the case at that time but I understand that the interveners felt that the factual set-up that they proved at the hearing was simple and clear, and that the remedy was obvious, and nothing could have been added by filing a brief.

The Commission, on Page 60 of its brief, also makes the point that the Texas interveners did not file exceptions to the Examiner's report which prescribed differential class rates. He did not prescribe any commodity rates, he regarded the record as not warranting any findings respecting commodity rates, that is, these export and import rates that Galveston and Houston are interested in; but the Commis- [fol. 221] sion overruled him, and out of the policy of Congress they found justification in their minds for prescribing these commodity rates on export and import traffic.

The evidence that the Galveston and Houston interests put into the record were solely with regard to export and import commodity rates which were not related to the class rates, and when finally the Commission's report came out using the existing class rates as the basis for commodity rates the Texas interveners naturally became vitally interested in the class rates and finally they petitioned for modification. They were taken by surprise.

Finally I would like to point out that the Commission, at Page 60 of its brief, says the Texas interveners introduced a comparatively small amount of evidence. Compared with the 16,000 pages that the record contains, this amount of evidence is small that was offered by the Texas interests; but in view of the evidence adduced by the railroads, we think it was all that was necessary for the relief we ask.

I thank you.

[fol. 222] ARGUMENT BY MR. HILLYER

Mr. Hillyer: If the Court please, I am appearing here today for the Savannah Sugar Refining Corporation located at Savannah, Georgia. It is engaged in refining raw sugar coming into the port of Savannah and trying to ship that in competition with other sugar refiners up into this

territory. That is the same business that the folks in New Orleans are engaged in; they are refining, most of them are refining raw sugar coming in from Gulf ports and shipping it up the river into this competing territory.

In many respects this is a sugar case, the Commission calls attention to it, that it is an outstanding commodity, and in normal times the heavy movement up the Mississippi River is sugar.

Now there is no commodity upon which the competition is greater than sugar. Sugar is a necessary of life and it moves in steady volume the year round. Each citizen in normal times eats about 100 pounds of sugar a year, so you can see those markets are where the people are, and the markets up in this central territory, are the markets we are all trying to get into.

Now the Commission has recognized this situation in [fol. 223] fixing the all rail rates. The all rail rate from New Orleans to Chicago, for instance, is 66 cents and from Savannah it is 66 cents and the rate to Indianapolis is 66 cents and the rate to Cincinnati and to Louisville, Kentucky, is 66 cents. They are all graded together and the rates are the same from New Orleans and Savannah up into this territory.

That brings us to the question of our interest in any preference that is given New Orleans in adjusting this case. We have followed this case throughout for the last fourteen years trying to protect our interests, and we are here calling attention to the injustices that the Commission has done to the Savannah Sugar Refining Corporation.

The point has been made in the brief filed by New Orleans that we are trying to take away from New Orleans the advantage of their location on the water. Now they know better than that, because we have stated all through the case that that was not our position. Our position is simply that we are here trying to prevent as a result of this case the loss of our inherent advantages in Savannah of low rail costs up into this region as against the higher costs on the barge and rail routes up here from New Orleans.

[fol. 224] Now the Court may think that this case involves principally the Mississippi River. I would like to indulge in a little geography here. This case involves the rates also on the Warrior River and the Warrior River gets right into the heart of the southeast, the territory that we built

our refinery to serve. It is not a tributary of the Mississippi River, the tonnage moves eastward from New Orleans, through the intercoastal canals and waterways up the Tombigbee River and then goes into the Warrior River and is hauled on it finally up into the northern part of Alabama, right in the center of this region.

Now in that region where we meet this competition up to the time of the hearing in this case, in selling sugar against that Warrior route, our folks had absorbed $464,000, we have to meet the rate whether it is water or rail or barge and rail and we have to absorb the difference, and the testimony from the President of our company in this case is that in three states alone, Tennessee, Alabama and Kentucky, up to the time he testified, it was over $464,000 and has been going right on ever since and it is much larger than that now, of course.

Now those figures will give you some idea of the com- [fol. 225] petitive situation which confronts us here in this case, and getting back to the Warrior River, we have in this decision of the Commission the most inconsistent—the decision is loaded down with inconsistencies but the most inconsistent thing in this report is what they say about the Warrior River and I will just read one sentence.

They are talking about these economies in this experiment, that if the expected economies from those sources do not arise, Federal believes its usefulness will be at an end. That is for the whole operation, but here is what they say in one sentence about the Warrior River:

"It apparently believes"—

that is the Federal Barge Line itself—

> "It apparently believes that its operation on the Warrior has already reached and passed the age of experiment."

The losses there are something terrible at the present time and they have been all the way through, and have been on the Warrior River, and you can see how this testimony is designed to justify the Warrior River, when it is not a navigable stream really, it is too narrow, the channel is too [fol. 226] tortuous, and it is time for this experiment to stop and time this shocking loss to the Government should stop.

Now there is one thing the Commission says for the Warrior River, and over on the page where they make a finding—now of course Mr. Spencer has called attention to the lack of findings, both primary findings and ultimate findings, but here I am inviting the Court's attention to the finding which does not cover the Warrior River in which the Commission apparently purposely omitted reference to the Warrior River; on the record, they did not seem to have the courage to go ahead and make this finding here about the Warrior River, and they say:

> "Viewing the facts before us in light of the clear Congressional policy with respect to water transportation on the Mississippi River and its tributaries we conclude that joint barge-and-rail routes and rates are necessary and desirable in the public interest."

What do we have here? We have a finding that there is no basis for any differentials on the Warrior River and we have a finding that is confined to the Mississippi River and yet over in the Appendix to this case they do prescribe [fol. 227] differentials and rates on the Warrior River.

Now there we have one of the most inconsistent things that ever came out of the Interstate Commerce Commission, a finding one way and the facts cited to support that finding the other way, and then, even in the face of that, they go ahead and put in these differential rates.

Now I would like to invite the Court's attention to this point: I know you have it on your minds, the Commission had it on its mind, that you have got to be careful of this barge line and not take the tonnage away from it and carry on this experiment, that is what the Commission says. But sugar does not come into that class at all; sugar is moving up right into this territory from New Orleans on port-to-port rates that are not involved in this case, and you have nothing to do with them here.

For instance the port-to-port rate to Chicago is 48 cents and a vast tonnage is being moved, then the port-to-port rate to St. Louis is 31 cents, almost one-half of what the barge-rail rate is, and so far as sugar goes, let me disabuse your mind of the thought that if you decide with the carriers the way they ask you to, on sugar you will not cause the [fol. 228] barge line to lose a pound of tonnage at all. They will keep on moving in on those port-to-port rates which are involved in this case.

Here are the figures again which I gave you. At the time of the testimony we had absorbed in the State of Alabama $169,326, that is against the Warrior River rate; on the sales in the State of Tennessee, $143,942 and on sales in the State of Kentucky——

Judge Lindley: You told us about that once, didn't you?

Mr. Hillyer: —$150,864, a total of $464,000, and that amount is much larger at the present time.

Now one of the points that has been made here, and the Commission has referred to it in its various decision- and Mr. Spencer has called your attention to it, that the only basis for a differential on rates is that it costs less and is worth less. Now both of those factors go out of the picture as far as sugar is concerned.

The Commission's own people, who investigated all of these cost studies, put in here by both rail and barge lines, came to the conclusion that the cost of the barge lines was up to 36 per cent greater than all rail and that is no small [fol. 229] amount of difference in rates, that is an enormous difference, 36 per cent, and that takes care of the cost. Sugar moving on barge-rail does not cost less than all rail. It costs more. And when it comes to the value of the service, we have testimony in this case that the most valuable service out of New Orleans bringing sugar up here is the barge line, that it is as valuable or more valuable than the rail line for the various reasons that are put in here. Some of them are admitted by the sugar companies in New Orleans, all such factors as changes in price, and the change in price while the sugar is on the river for fifteen days or longer than that moving up here, is all in favor of the man who is buying the sugar. He buys the sugar in New Orleans and it is fifteen days coming up the river and the price of sugar goes up, why, he just makes an enormous killing out of it, on just a few cents a pound.

Judge Igoe: Suppose the price goes down?

Mr. Hillyer: Suppose the price goes down, the contract of sale protects them, so that and the various other elements do away with the only theory that has been advanced by the Commission or anybody else in justifying a differential on barge-rail rates.

Now the report of the Examiner is in this case; under [fol. 230] the administrative law that report is part of the case, and the Commission did not put in some of the things he said about this sugar business. The report of the

Examiner states that clearly they have no hope, that is the Government has no hope, of putting the Valley service on a paying basis and there seems to be no present intention of discontinuing that operation.

He further states the Examiner recognizes the unfairness of the existing differential in rates and states that if the barge line performs services at less than cost, which it is doing, it would be guilty of an unfair and destructive practice which might call for the exercise of the Commission's restraining powers.

I will just use that excerpt of the Examiner's report to say that we are asking this Court to exercise its restraining powers against this unlawful adjustment just as the Commission's own Examiner suggested. That is our request in the findings of fact.

I thank you.

[fol. 231] ARGUMENT BY MR. HICKEY

Mr. Hickey: May it please your Honors, my name is William J. Hickey. I represent the United States, defendant in this case.

It is unnecessary, in view of the comments of the court, and in consideration of the argument of the plaintiff, to emphasize the complete dependency of the plaintiff on the proposition that the relative level of the rates in this proceeding must depend on the comparative costs of the services involved.

The Commission in this action was performing its delegated legislative functions in rate-making. In the performance of that function it necessarily has to be governed by the applicable statutes involved, as well as the policy and intent of Congress announced at the time those statutes were enacted.

In the course of our argument, we will show that the Commission action is in accord with these statutes, their literal provisions, and as they have been interpreted, as they have been explained by their legislative history, as they have been applied in their administrative history, and as they have been interpreted in their judicial history.

In the course of this argument we shall show that the relative measure of operating costs never has been regarded [fol. 232] by the Commission nor the courts as the decisive factor in rate-making.

The position of the defendant may be briefly summarized as follows:

(1) The prescription by the Commission of joint rail-barge rate differentials lower than all-rail rates between the same points is justified by the literal provisions of the Interstate Commerce Act, consistent with the intent and policy of Congress, as expressed in legislative, administrative, and judicial history of such provisions.

(2) The Commission in the prescription of the rates here involved did not affirmatively find that there were no economies in favor of rail-barge service. In the absence of such finding, it is not determinative of the issue here, because the cost of service factor has never been regarded by the Commission or the courts as a controlling basis in the field of rate-making.

(3) The general proposition that the ultimate findings made by the Commission are supported by the necessary findings of fact and justify its conclusion.

In this portion of the argument I will deal with the statutory authority of the Commission, in support of our proposition that it is authorized to prescribe the rates here in-
[fol. 233] volved, and that the rates here involved are consistent with the present applicable statute, which is in itself consistent with related statutes previously enacted by Congress and representative of the consistent policy of Congress with respect to the matter of water transportation.

Mr. Reidy will present the balance of the argument, directed to the cost factor and its significance in the measuring of these rates.

As we stated, the Commission here is performing its legislative function in rate-making. The Commission in the performance of this function has to take into consideration the primary irrefutable fact that water transportation is an inferior method of transportation to rail transportation. They have to take into consideration the fact that traffic won't move by the inferior method of transportation unless there is a lower rate to the public for such service. The power, the present day power of the Commission, to prescribe the joint rates applicable to this joint service, is contained in Section 307 of the Act, which states generally that when the Commission deems it necessary or desirable in the

public interest, it may prescribe such rates for the joint service.

[fol. 234] The section further provides in case of a joint rate operation in part by water carrier the Commission shall prescribe differentials justified in the circumstances, reasonable differentials justified in the circumstances.

Judge Lindley: That is your question, whether the circumstances justify them.

Mr. Hickey: That is our question, your Honor. There is also the question, specifically raised, that in the absence of a specific finding that there is a saving from the comparison of operating costs, this action is claimed to be contrary to the statute. Its significance and meaning is announced and continuously interpreted by Congress.

Judge Lindley: Did it ever occur to you that the intent of Congress may be interpreted as a desire to subsidize the water transportation service?

Mr. Hickey: Obviously, your Honor, that is the true case.

Judge Lindley: The what?

Mr. Hickey: That is the true case.

Judge Lindley: If it is, why didn't they do it directly at the cost of the tax-paying public instead of at the expense of the rail carriers?

Mr. Hickey: I don't think it is at the expense of the [fol. 235] rail carriers.

Judge Lindley: There is no question that if an all-rail carrier rate is higher than the combined rate, that, competitively speaking, they are at a disadvantage, competitively, and these people, you were frank to admit, are subsidized.

Mr. Hickey: I would rather suggest, your Honor, that these rail carriers will move shipments in all-rail transportation when the character of the product to be transported requires the superior service, and they are not going to be robbed of their superior service, their superior ability to render expedited service, service that will safeguard the type of cargo that needs to be moved in that type of superior service, where the shippers are willing to pay the extra cost.

The policy of Congress in not directly subsidizing, if it may properly be so termed, I can't explain why they did not do that directly. The policy of Congress is to foster water transportation.

Judge Lindley: But they can't do that at the expense of somebody in economic competition by depriving the other of the competitive advantage. That is not a policy that is conducive to good government.

Mr. Hickey: Now, your Honor, when you say at the ex-
[fol. 236] pense, you mean that the Commission has unfairly taken away and illegally taken away the business of the rail carrier. We say the underlying proposition of the barge lines and water carriers generally, the proposition relied on by the barge lines throughout the course of the proceeding was the fact they wanted to be treated exactly the same as a connecting rail carrier, an originating rail carrier; they wanted an order providing that the connecting rail carrier in the second leg of this rail-barge shipment, will get the same division——

Judge Lindley: Yes.

Mr. Hickey: —that it would get if the shipment originated by rail carrier.

Judge Lindley: Yes. The rates are substantially the same as those existing now?

Mr. Hickey: Substantially the same.

Judge Lindley: And you are losing money?

Mr. Hickey: I don't think that shows in the record.

Judge Lindley: You and counsel on the other side don't agree, because he says that over the years of operation it showed a deficit, a loss during operations, not in every year, but on the average over the years. You think that is not correct?

[fol. 237] Mr. Hickey: As to the relative operating loss or profit of the Federal Barge Lines, I don't think there is any direct evidence in the record that shows why it is losing money on an annual basis. The chances are that with this proposition that the court is now faced with, and further I do point to the fact that the Commission recognized and Congress has repeatedly recognized, and I will bring that point up a little later, that the barge lines have been in an uneconomic position with respect to their floating and terminal equipment; that Congress intended to do something to improve that situation, so that the shipping public can have this cheaper means of transportation.

Judge Lindley: All of these barges are not government-owned. Two or three are privately owned.

Mr. Hickey: That is correct. If this situation proves uneconomical to them, they are going to try to improve their

service so that they can make a profit, or reduce their operating costs.

Judge Lindley: How long have these present rates been in effect?

Mr. Hickey: These present rates have been in effect generally, I will answer your question with qualifications, since 1918.

[fol. 238] Judge Lindley: That is the joint rail-barge rates?

Mr. Hickey: The joint rail-barge rates have been in effect generally since 1928, and shortly before, about 1923 or 1924. I won't go into that history but just to highlight. I would like to highlight that history to show the existence of these differential rates down through the time since the revival of barge transportation on the Mississippi River.

In 1918, when the railroads went back to private ownership, and the government took over directly the operation of the barge lines, the Director General of Railroads fixed rates for the barge service at 80 per cent of the rail rate. That was back in 1918. He fixed it at 80 per cent or 20 per cent less because he knew because of the inferior service barge lines would not get any traffic.

Judge Lindley: The thing I was interested in when I asked that question, was this: The Commission said that they did not think they should interrupt the experiment. How long has this experiment got to continue? It has been going on since 1928, 21 years, and is still not performing or operating with an economic gain.

Mr. Hickey: Absolutely, and the answer to that is neither you nor I or the Commission have anything to do as to how [fol. 239] long the experiment should go on. That is not a question——

Judge Lindley: Yes, but of course, but measured in a reasonable length of time it may be a lot of experiment. The experiment ought to have been completed in 20 years.

Mr. Hickey: That discretion is imposed in the administrative agency to experiment.

Judge Lindley: Yes, but there comes a time when that experiment becomes an abuse of discretion.

Mr. Hickey: Of Congress?

Judge Lindley: No, of the Commission. Congress did not say, Congress had no right to say, irrespective of the facts and circumstances, you shall grant the total rate, unless justified by the facts and circumstances, when the

Commission is created for the very purpose of fixing just and reasonable rates. The test of its determination of just and reasonable rates, what is just and reasonable, depends upon the facts and circumstances. Do you think Congress can arbitrarily establish a rate itself?

Mr. Hickey: I think it could.

Judge Lindley: Without regard to facts and circumstances?

Mr. Hickey: Without regard to specific facts and cir- [fol. 240] cumstances, such as the particular matters raised by plaintiff here, the cost of the service. There are a number of particular facts and circumstances that enter into the measuring of the rates, and one of the specific commands placed upon the Commission in the several sections of this Act is that they may in the measuring of the rates provided, give consideration to the fact whether the traffic will move by that means of transportation. We have referred to that in our brief, and it is in Section 307.

Judge Lindley: Yes, it is very well covered there.

Mr. Hickey: I would like to read to you just for a minute some of the thoughts of Congress back at that time, as to why they enacted these several statutes directed specifically to the proposition that the Commission shall preserve the ability—when I say the ability, I want to be specific,—the ability of the water carrier to operate at lower rates than rail carriers.

Now, there has been talk of comparison of operating costs. Later in this argument—and I won't impinge on that—we will show that rates and costs have no basis in fact. What we are talking about here is comparison of rates, the price that the public will have to pay for water [fol. 241] transportation, the price the public will have to pay for rail transportation. And that is what this court said in the Mechling case, that you cannot take away that inherent advantage to the public, the ability to get water transportation at a cheaper cost. That is what Congress recognized back in 1924, when it created the inland water service. It said this:

> "The Committee is convinced that the value of pioneering as being conducted by the government cannot be over-estimated. In the early days of the Republic the rivers were the chief means of transportation. This was followed by the era of railroad building, which the

> government encouraged in every way possible, even by giving large land grants. It is said that the total amount of land granted by the government to aid in the expansion of the railroads amounted to as much in area as the thirteen original states. The railroads soon drove transportation from the rivers by a policy of destructive competition continued without interference by the government until practically all river transportation ended."

[fol. 242] They further said:

> "Railroads surrendered the advantage of the division of freight rates for regulation which will require several years before they can be induced or compelled to submit to a fair and equitable division of the joint revenues with a water carriers."

They further state they are proceeding in every way possible to insure that that be done. That was followed in 1928——

Judge Lindley: Maybe they are fighting a natural evolution.

Mr. Hickey: I won't argue with that statement.

Judge Lindley: Maybe the Diesel engine is about to supersede the steam engine. Congress cannot prevent that. The canals in the olden days were superseded by other means of transportation. The government could not prevent that, unless it subsidized the inefficient service, the slow service, to keep it alive in competition with the efficient service. All those matters are matters of evolution. Is the Commission's action with this idea, that this service, expensive and costly and which is losing money, must be continued on the theory that this thing, which after all is experimental, will in the end, when this experimentation is done, show [fol. 243] some public benefit?

Mr. Hickey: The Commission in this action is following the definitely stated will of Congress that has been pronounced so many times, and specifically in connection with the transportation policy.

Judge Lindley: You don't think Congress intended the Commission should act irrespective of evidence?

Mr. Hickey: No, we don't stand on that.

Judge Lindley: Facts or circumstances sustaining, justifying reasonable rates?

Mr. Hickey: We will attempt to show, your Honor, by findings of the Commission later in this argument that these are justified by transportation circumstances and conditions. There are no rates here prescribed that by reason of circuity, circuity of operation, or by reason of the short relative service of the water board leg of the journey, that are established or prescribed, and therefore uneconomic. The whole proposition as announced by the Commission was that the water carriers put forth their cost, added to it a profit, reasonable they thought, and came out at a relative rate lower than the division that they would receive from joint service with the railroads, and that balance available was a differential so determined. They say they can operate. [fol. 244] That was the fact when the Commission decided this report. I am going to have to speed along, if I may.

Judge Lindley: I have interrupted you a good deal. I am sorry.

Mr. Hickey: I would like to refer again to the specific manner in which Congress has dealt with this problem. In the Dennison Act, enacted in 1928, they incorporated in there a provision that required the Commission to summarily prescribe joint rates on through routes for water and railroad traffic. They prescribed it as follows:

> "Paragraph e of the bill is more or less a technical provision to speedily obtain the benefit of through route joint rates and the fair division of the joint rate with connecting rail carrier. No water transportation service can successfully operate upon the inland waterways in this country today if it has to depend on port-to-port traffic. The old packet steamer will never come back. Transportation on inland waterways must depend largely on the bulky commodities that do not require speedy delivery."

I will shorten this statement.

> [fol. 245] "Hearings on this bill convinced the committee that legislation somewhat drastic is not only needed but is necessary to fully carry out the purpose of creating the Inland Waterways Corporation and to realize the benefits of the policy of Congress manifested

by the large expenditures made for the improvement of the Inland Waterways."

Now, if there is any doubt today on that policy of Congress, they have spent one billion dollars for the improvement of this Inland Waterways Corporation, and if the Commission should come along and drive one means of transportation out of this through service, and this court supports that theory, I would like to refer to the report of the Senate Committee on the amendment of the Inland Waterways Corporation Act, October 31, 1949. They state first:

"The principal objective of the bill is to provide additional capital in the sum of $7,000,000 to the Inland Waterways Corporation for the purpose of rehabilitating the barge fleet now being operated by the Corporation on our inland waterways and particularly that part of the barge fleet being operated on the Mississippi River and its tributaries."

[fol. 246] They say next:

"Your committee cannot emphasize too strongly the importance of the fulfillment of the declaration of policy contained in subsection (c) of section 3 of the original Act and the importance of the establishment of joint rail-barge tariffs in conformity with that declaration of policy."

The amendment repeats the previous declaration of policy as contained in the original Act, and here is so repeated, so that there can be no question as to the intent of Congress to have the declaration of policy include the establishment of joint tariffs with rail carriers, carried through to fruition. That was two months ago.

Now, that consistent policy of Congress has followed through for the last period of 1918 to 1949. The Commission did not think it had the power to eliminate this possibility of improving inland waterways transportation in this country. The policy so clearly announced in the national transportation policy is that all of the Act must be administered to foster the three means of surface transportation, rail, water and motor carrier.

I would like the opportunity to discuss the Mechling case, [fol. 247] but I know it will be covered later.

I have been asked to take a short time to speak the views of the Secretary of Agriculture in this matter, who has not, by reason of the number of counsel appearing here, intervened in his own behalf. I paraphrase his letter to the Attorney General:

> "I am interested in anything that may arise under two Acts of Congress which authorize and direct the Secretary of Agriculture to take cognizance of the transportation situation involving the welfare of agricultural communities. The interest of the Secretary of Agriculture in this matter is covered in the following points:
>
> 'The Secretary of Agriculture believes that shippers of agricultural commodities should enjoy the inherent advantages of water transportation, and the Secretary regards the Commission's order in the instant case as a logical extension of the decision of the Supreme Court in the Mechling case. The Secretary of Agriculture believes that the federal expenditures on the waterways of this country to make [fol. 248] them navigable streams presupposes their use as an integral part of the national transportation system.' "

In conclusion of my portion of the argument, I would like to refer back again to the national transportation policy, which provides that the Commission shall by fair and impartial regulation of these modes of transportation develop, coordinate and preserve the national transportation system by waterways and rail adequate to meet the needs of the commerce of the United States and the National Defense. The Commission did not think it was in a position to take this definite step sought by the 3,000 railroad plaintiffs here, which in my opinion is one definite step toward the elimination of water transportation in this country. I thank you.

ARGUMENT BY MR. REIDY

Mr. Reidy: If your Honors please, my name is Edward M. Reidy. I am representing the Interstate Commerce Commission in this case.

In connection with the argument made by Mr. Hillyer, and his comments on the adverse effect upon the Savannah

Sugar Refining Corporation, it is perhaps sufficient to call the court's attention to the fact that on page 617 of the report the Commission discussed the peculiar situation of [fol. 249] sugar, and said that the barge-rail rates on sugar have a vital relation to the general competitive rate relationship on sugar from all producing points to midwestern consuming points, and "We consider it highly desirable that no change in sugar rates be made as a result of our findings herein." In other words, Savannah Sugar Refining Corporation is in the same position now as it was prior to the Commission's order in this case.

Mr. Spencer in his very able argument stated that the Commission made no finding with respect to the reasonableness of the rail rates. Well, the rail rates were not in issue. The things that were put in issue as a result of the Commission order in this case were the barge-rail rates and barge-rail differentials. Then, under these circumstances, there was no record based thereon. It would have been improper for the Commission to have made any finding concerning the reasonableness of the all-rail rates. They did make a finding that the differentials were reasonable.

In connection with the reference to the Commission's finding that negative statement, that it was not possible for it to say that there were any demonstrable economies at the pres- [fol. 250] ent time in combining barge-rail with all rail traffic, of course, what the Commission was speaking of was the economies from the cost of physically transporting the property, and the words I think at the present time have some significance, because at a later part of the report the Commission speaks of the considerable sums of money that have been expended by Congress in modernization of equipment, particularly of the Federal Barge Lines, and I think there at least is hope that with modernization of the equipment and the terminals that those operations will be profitable.

Now, of course, from the standpoint of the shipper, there is saving in the cost to the extent of the difference between the all-rail rate and the joint barge-rail rate, and the Supreme Court, of course, has pointed out in the Ayershire case that went up in this district——

Judge Lindley: Went up from Indiana, in this circuit.

Mr. Reidy: That the Commission has to have in mind the consumer's interest as well as the interest of the carrier.

Secondly, the contention as to costs is that costs are an all-determining factor. Now, it is well recognized as a [fol. 251] matter of transportation economics that not even on the same railroads operating between the same points are costs the same. They vary. And for that reason the Commission has only given them some weight along with numerous other factors, as the circumstances of the case warranted. They have never treated them as a controlling element. They are an element to be considered along with others, and, of course, as Mr. Hickey has pointed out, the Commission is directed where one of the carriers is a water line, it is a mandatory requirement to prescribe the differentials where justification therefor is found. Now, the Commission has a chapter in its report which I know the court will read, headed "Justification of differentials," and that is the Commission's answer to that phase of the question.

Judge Lindley: I have read it with a great deal of interest, but it did not seem to me to make any finding of fact. It was a statement of the policy of the Commission. I considered after I got through reading that statement, it was very confusing to me, that the Commission had had facts in justification for the findings they may have made in that case. But I read it hastily.

[fol. 252] Mr. Reidy: I have covered that chapter very fully in the brief. I think your Honor on a more careful reading will find some additional things in there. It is shown that the Commission over a good many years has prescribed differentials when there has been no showing as to savings in costs. As I say, I am not going to take your time, but I will refer here to that again.

Now, there are three other counsel representing the water lines that I would like to have you hear, if your Honors will permit.

Judge Lindley: Very well.

Mr. Reidy: May I present Mr. Harry Ames, of Washington, D. C., a member of the Supreme Court Bar, representing the Mississippi Valley Barge Line Company.

Argument by Mr. Ames

Mr. Ames: If the court please, I am appearing for the privately owned and operated Mississippi Valley Barge Line Company.

Judge Lindley: Are you making money?

Mr. Ames: On what?

Judge Lindley: On the services you render the public.

Mr. Ames: Yes.

Judge Igoe: The barge line.

Mr. Ames: Yes, we are making money. And, incidentally, [fol. 253] we were making money when this record was made, when 33 per cent of the railroads were in receivership.

I may say by way of introduction, your Honors, that I have been counsel for the Line since its inception and obtained their original certificate for them. I attended every hearing in this case, off and on, for a period of eight years.

In order to give emphasis to some of the points, I would like to make some evaluation of this rate structure. I would like to hand your Honors some exhibits, and ask you please to refer to them as I talk.

The joint rate structure and the Congressional administrative policy with reference to it divides itself naturally into three periods—the first period from 1920, when the Transportation Act turned the railroads back to private control; the second period that ran to 1928—the second period was from 1928 to 1940, during which period the Dennison Act was the law; and the last period runs from 1940 to the present time.

Now, Exhibit A, your Honors will note, contains the three sections of the Act under which the Commission was empowered to prescribe joint rail and water rates from 1920 to 1928. I call your attention to one statement that appears [fol. 254] at the bottom, which is Section 15.3, and to the fact that there was a very definite limitation in that section that the Commission could not prescribe rail and barge rates except at a maximum rate. The Commission, notwithstanding the limitation, prescribed rail and barge rates on a differential basis on sugar, knowing that the sugar rates all-rail were less than maximum rates. Now, that was the case where the Commission jumped through the limitation and prescribed differential rates.

I also call your Honors' attention to the fact that in none of those three sections of the statute is there any mention of the word "differential," in none of them. Yet the Commission had no hesitancy in establishing the differential rates.

Judge Lindley: I don't suppose you need any express grant of power to grant differentials. The question is: Is it a reasonable rate?

Mr. Ames: That is right.

Judge Lindley: They may involve differentials or not.

Mr. Ames: I would say the question is whether it is a reasonable differential.

Judge Lindley: Yes.

[fol. 255] Mr. Ames: A reasonable differential attached to a reasonable rate comes out to a reasonable water rate. Things are equal, the same things are equal to each other.

Now, this Exhibit B is the Dennison Act. That is too long to read. I am not going to read all of it, but you will note the last two or three lines give the Commission specific directions to establish rail and barge rates with differentials. It says with minimum differentials.

Judge Lindley: Reasonable minimum differentials.

Mr. Ames: To apply, yes, sir. Now, that Act was passed because Congress felt at that time that the railroads were too loathe to get into this joint rate structure with the barge lines. They were fighting it at every step. So the Dennison Act was passed as an expediting Act, and it stayed the law until 1940 when the new Transportation Act of 1940 was passed. I think your Honors know very well that that Act was the product of a sentiment on the part of the country that water lines should be brought under complete regulation like the rail lines and truck lines. In other words, railroads were the ones urging regulation of water carriers.

[fol. 256] When Congress came to write the Transportation Act of 1940, the original bill was known as Senate Bill 229, and that contained a provision covering the establishment of joint rail and barge routes, which is shown in this Exhibit D, the last one. You will note the way the Senate passed the bill, they repeated the Dennison Act language word for word. The way the House passed it, they modified the language. The House said the Commission may prescribe such reasonable differentials, if any, as it may find to be justified between the all-rail rate and the joint rate.

Now, in view of the conflict between the House and Senate, the bill had to go to conference, and Congress asked the Interstate Commerce Commission to comment on that difference. The Commission said the Senate Bill was too

rigid, because it would require the Commission to fix differentials in any case, regardless of circuity or anything else. The House provision, the Commission said, "We think that is unnecessary, although it is unobjectionable. It is our duty to fix a differential when we find a differential justified." So the Commission made that comment, and the bill went up at a joint conference.

Exhibit C shows the way it came out of that joint confer-
[fol. 257] ence. I am going to shorten this as much as possible, and I am going to call your Honors' attention to two very important changes that that joint conference made. Notwithstanding, mind you, that the Commission said that the language in the unchanged version was all right, the first thing they did was to take out the word "may" and put in "shall." That is a very important change in any piece of legislation. The next change they made was to take out those two words "if any," and that I say to your Honors is a very important change. If the railroads succeed in this case, this court is going to have to hold that by regulating water carriers in 1940 the Commission's power over through routes and joint rates has been diminished from what it was in 1920; and I don't think the court has any basis for making such a holding or finding in the light of the legislative and administrative history which is covered fully in my brief. I thank your Honors.

ARGUMENT BY MR. BELNAP

Mr. Belnap: If your Honors please, my name is Nuel Belnap. I represent the Inland Waterways Corporation.

Judge Lindley: You are another private barge line?

Mr. Belnap: No, I am the Federal Barge Lines.

[fol. 258] Judge Lindley: Oh, you are the Federal Barge Lines?

Mr. Belnap: I am the Federal Barge Lines, if your Honor please. I am going to touch on the matter of costs insofar as that element is at the root of the grounds for invalidity of the order on which the plaintiffs rely. They start out with two invalid premises of fact in respect to that proposition. First, they assert that the Commission affirmatively found the rail-barge cost of service to be not less than the all-rail cost of service. I am not going to labor that point. The words of the Commission are before the court. It is a problem of semantics. But, nevertheless, the lan-

guage on which the plaintiffs rely, when read in the light of the report as a whole, seems to me only this. The Commission concluded it had no current evidence on which it could base a finding as to which was the lower cost agency.

Judge Lindley: We don't find anything anyway in that that would justify us in saying it was an economic benefit.

Mr. Belnap: They said in effect, we find, insofar as cost and service is concerned, if we are going to use that as a measuring stick, nothing on which we could base a differential. I think the Commission clearly said that. The Com-
[fol. 259] mission did not, however, say that relative cost of service was a proper yardstick.

Judge Lindley: Did not say it was or was not?

Mr. Belnap: Did not say one way or the other.

Judge Lindley: But it is an important factor; it is an important fact.

Mr. Belnap; I think that is true. In a previous barge-rail rate case the Commission has proceeded on the theory there was an underlying element of relative costs in the picture, but the costs were always the costs of the water lines. The Commission never in more than 50 years of its history has dealt with water-rail adjustments by considering or by comparing the costs of water service with the costs of rail service. It has done only what this court permitted by the Supreme Court Rules had to do in the Mechling case, protect the water lines, when its ability to charge cheaper rates by comparison with the price which the rail lines put on their service, was considered to be the inherent advantage of the water lines. There has never been, and you cannot, no one can find, a reported case where there is a water rate adjustment, in which the average cost of rail service has been brought in and the Commission has used that as a
[fol. 260] predicate for making a comparison of costs between costs of operation of water and rail service.

You have these plaintiffs stating to you in briefs, stating to you again in argument this morning, and categorically, that the railroads are the low cost agency. Their case revolves around the proposition that they sustained that as a fact; they ask you to find that as a fact from the evidence, and then they ask that the law, that the national transportation policy, be interpreted to hold that it is an inherent advantage, so if the Commission did not preserve it, the Commission acted beyond its authority.

Now, from the standpoint of the questions which are open and in the realm of judicial review, it seems to me that what the plaintiffs' case comes down to—but before taking up the law on the question of what the Commission has to do or can do, or what it has the right to do with respect to costs, I would like to make it plain to the court that there is no possible and practical way of ever determining what it would cost the railroads to render service in respect to the identical traffic and between the identical points where the barge traffic moves, and it is impossible to do that be- [fol. 261] cause the only thing they can bring by way of evidence, and the only thing they brought out in their evidence, was their average cost of transporting the entire traffic over their entire railroad system.

Now, that entire traffic, their traffic, consisted of a great volume of shipments which never touch the barges in connection with this joint service—commodities such as petroleum products in tank cars, live stock, bulk grain, and perishable freight of all kinds, which is the predominance of the railroad traffic. It is not traffic which is handled on the barge-rail service; and, yet, on the basis of evidence which intermingles live stock, perishables and coal, along with Mr. Hillyer's sugar, the railroads bring forth an average unit cost of handling all that traffic, applying it to sugar, and say that is what it would cost us to haul sugar.

Well, now, the Commission and the courts have repeatedly held that it is impracticable to take the average cost on all [fol. 262] traffic and apply it to a particular movement and treat it as the actual cost of that particular movement.

My brief calls attention to the Northern Pacific case, 268 U. S., in which the Supreme Court struck down an order of a state commission because it took the very approach to the problem that the railroads ask you to take in this case.

Now, on the question of law as to whether evidence and a finding as to relative costs is an indispensable fact in this case, and if it is not an indispensable fact, then the plaintiffs have no case whatsoever, I am simply going to call your attention to the leading authorities. There is cited under Point II in the barge line's brief, which is the section of our brief which deals with cost, the Louisiana Public Service Commission versus Texas and M. O. R. Co. case (284 U. S. 125), wherein it is held that the determination by the Commission of the cost of the service is not required as an indispensable factor in fixing rate relations.

We cite Baltimore & Ohio versus United States, 298 U. S., and the very recent case of New York versus United States, in 331 U. S.; Illinois Commerce Commission versus United [fol. 263] States, 292 U. S. 474. All of those held that the weight to be given cost evidence, the degree of acceptance or rejection of cost evidence, is a matter wholly within the Commission's final say-so. It is not error which can be relied on for judicial review if this Court were to conclude the Commission came to an erroneous conclusion on that matter.

And then we cite New York versus U. S., in 331 U. S. 284, and the Ayrshire Collieries versus U. S. case, as well as the Standard case in 232 Federal Supplement, which was sustained by the Supreme Court on certiorari in 312 U. S., and those cases held that rates don't have to be proportionate to cost. In New York versus United States it was a class rate case. The Commission required reduction in the west and increased the rates in the east in order to bring about a mile-for-mile parity of class rates. The western lines assailed that order on the ground that the evidence as to average cost in that case, which the Commission accepted for the purpose of territorial averages, showed beyond any doubt that the average costs in the west were higher than in the east, and on that basis the western lines urged that the Commission had exceeded its authority, that it had come to a conclusion contrary to cost; and the Supreme Court [fol. 264] squarely sustained that order of the Commission on the ground that it was within its discretion, considering the many matters which go into the making of rates, whether they fix a rate in proportion to cost or whether they should be fixed contrary to cost.

Now, we have in this record page and page of evidence as to shippers' needs, value of service, commercial conditions, economic conditions, all sorts of competitive conditions. We have a full description of the existing rate structure, and a rate structure as to which the Commission in its report makes a specific finding that it has proved generally satisfactory, and on the basis of all that, the Commision came to its conclusion, came to its conclusion on a basis which we submit to your Honors is clearly within its authority.

It is impossible in the time allotted to cover the whole phase of my argument as I have outlined it, because there are other counsel still to follow. I thank you.

Mr. Samuel H. Moerman: May it please the Court, my name is Samuel H. Moerman. I appear for the American Barge Line Company, which is operating and is making money, and so far as I know always has.

[fol. 265] Now, I will address myself briefly to the question of the adequacy of the evidence, and the adequacy of the Commission's findings in this case. Briefly, Section 14 of the Interstate Commerce Act provides that whenever the Commission shall make an investigation, it shall make a written report thereon, which shall contain its conclusions and its order. The provision goes on and provides that in case damages are awarded, the Commission shall make findings of fact. Now, I point to the proposition that only in cases where damages are awarded is the Commission required by the statute to make findings of fact. In other cases it may make its report in writing, stating its conclusions, and attach its order or requirement to its decision.

Now, incidentally, the contention that the Administrative Procedure Act applies in this case is without any basis. That Act, Section 1011, specifically provides that it has no application to cases initiated prior to the enactment of that law. This case was begun in 1934. The Administrative Procedure Act became effective in 1946, and as to certain of its provisions at a later time.

What we have here, your Honors, is a rate case, a [fol. 266] case where the Commission under the Act of Congress prescribed certain rate differentials for future application. The railroad contention, that in prescribing rates the Commission must make findings preliminary to its ultimate finding, is a new and novel proposition. It has no support in the law, and there are no cases to support the point. In fact, the contention goes completely contrary to the law and all the cases on this particular proposition.

We believe that this confusion by the plaintiffs in this case arises from two types of administrative action. One type of administrative action does, indeed, require preliminary or so-called indispensable findings prior to an ultimate finding by the Commission. The classical case on this point is the so-called power reverse gear case, in 293 U. S. In there the Boiler Inspection Act empowered the Commission to require installation of power reverse gears in locomotive cabs, if the Commission found that manually operated

power reverse gears subjected railroad employees to unnecessary peril to life and limb or made the locomotive unsafe. In brief, the Commission came out with an order in which it required that railroads install power reverse gears in locomotives. It made no finding as to whether [fol. 267] the manually operated reverse gear caused any unsafe condition or unnecessarily imperiled the life and limb of railroad employees, so quite naturally the Court struck down the order. That finding was a pre-condition to bringing into play the power of the Commission to order the power reverse gears installed.

But here we have a different type of administrative action. This is a rate case, where the Commission prescribed rate differentials. On Page 7 of the railroad brief it is said that the Commission did not make the basic findings of fact which the Supreme Court has held to be essential to support the Commission's ultimate finding; that there are no Supreme Court cases cited following that statement—and for a very good reason: there are no such cases, and there is no law which requires that the Commission make basic or preliminary findings before it prescribes just and reasonable differentials or rates.

In this case, as the report shows, the Commission considered the evidence for the shippers, the evidence for the barge lines, the evidence of the Mississippi Valley Association, and a great number of Chambers of Commerce and other persons. It had before it specific rate differential [fol. 268] proposals of the barge lines, with respect to the measure of the differentials and the territorial groupings to be employed in connection with these proposals; and as the report shows, the Commission selected and rejected from what it had before it, and it prescribed what in its judgment would be just and reasonable differential rates, as it has done literally thousands of times in its long history in rate proceedings. It took a set of differentials, your Honors, which had been in effect for many, many years, and in conjunction with the evidence in the record it fixed new differentials, it revised some of the old differentials, and it eliminated some of the old and proposed differentials which it deemed to be not justified and not reasonable. In essence, the Commission made the precise finding required by law in cases of this kind. It said that it considered all the evidence of record. The railroads say that the Commis-

sion's statement that it considered all of the evidence of record is a technical protestation.

Now, in Interstate Commerce Commission versus the City of Jersey City, 322 U. S., the Supreme Court, in a rate case, said:

> "The Commission considered that it had, and we [fol. 269] find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. 'With that sort of evidence before them, rate experts of acknowledged ability and fairness, each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could be only one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive.' "

Nothing about basic findings, nothing about preliminary findings—merely evidence before the Commission out of which the Commission in its judgment might reach a conclusion. Now, this is the familiar doctrine of administrative finality. In cases such as this one here the Commission's ultimate conclusion must be supported by evidence, and nowhere in the law is there any requirement for findings [fol. 270] of fact or findings preliminary to the laying down of an ultimate conclusion.

The railroads contend also that the decision is contrary to the evidence, but the Supreme Court in the Baltimore & Ohio case, 298 U. S., said:

> "There is no requirement that the Commission specify the weight to be given any item of evidence or disclose the mental operation by which its decision is reached."

The Court said:

> "Uniform precision in respect to either would be impossible."

Now, finally, so far as the adequacy of the evidence goes, the existing rule on that announced by Justice Jackson in Interstate Commerce Commission versus Jersey City, which I cited a moment ago, in that case the Court said, referring to a previous case, that it had reference to the weight of the evidence, and held that being supported by evidence, no basic findings, no preliminary findings, simply the Commission order, having been supported by evidence, the judgment of the Commission must be final.

We respectfully submit, therefore, that the Commission order is supported by evidence, and that its findings are [fol. 271] proper and consistent with the requirements of law.

ARGUMENT BY SCHWARTZ

Mr. Louis A. Schwartz: If the Court please, my name is Louis A. Schwartz, from New Orleans, in the State of Louisiana.

Judge Lindley: For whom are you speaking?

Mr. Schwartz: In behalf of the public, who so far seem to have been lost sight of in the discussion.

Judge Lindley: The Government of the United States sufficiently represents the public.

Mr. Schwartz: I represent the shippers of New Orleans, Baton Rouge and Memphis.

Judge Lindley: You can have five minutes.

Mr. Schwartz: I have a very brief statement to make, because I think——

Judge Lindley: You may have five minutes. Go ahead.

Mr. Schwartz: I have a very brief statement to make, because I think the position of these shippers is stated very briefly in our brief, and I will take less than five minutes.

If your Honors please, my name is Louis A. Schwartz. I am appearing in behalf of the Baton Rouge Traffic Bureau, Inc., the Memphis Freight Bureau and the New Orleans Traffic and Transportation Bureau, intervening defendants, and [fol. 272] we respectfully request that the pleas of the plaintiffs and intervening plaintiffs be denied.

The Baton Rouge Traffic Bureau, Inc., which is the successor to the Baton Rouge Chamber of Commerce Traffic Bureau, represents the shippers and receivers of the port and community of Baton Rouge.

The Memphis Freight Bureau represents the shippers, the industrial and commercial community of Memphis.

The New Orleans Traffic and Transportation Bureau, successor to the New Orleans Joint Traffic Bureau.

They participated very actively from the beginning of this proceeding, representing the shippers, and the ports, commercial, industrial and shipping interests of the city and port of New Orleans.

This proceeding here is a very vital one to the very existence of the present barge-rail rate structure, extending from the Rocky Mountains on the west to the Atlantic Seaboard on the east. The barge lines and inland waterways are dependent upon proper and adequate differentials between barge and all rail.

In disposing of the issues involved, the court should [fol. 273] consider the almost unanimous testimony of the shippers appearing in this proceeding as to the needs and desirability of differential rates, in the public interest. The voluminous evidence introduced by the shippers is that barge-rail routes will not and cannot possibly be used in the absence of a differential, because of inferior service.

To paraphrase the testimony that was introduced by practically all shipper witnesses, in a record that consists of approximately 16,000 pages and innumerable exhibits, all of the witnesses, except in very isolated instances, indicated very definitely that they would not use the barge service in conjunction with rail service unless they were offered some saving in their transportation cost.

So, if your Honors heed the plea of the railroad carriers that the joint barge-rail rate should be increased to the level of the all rail rate, why, it is obvious that barge-rail routes automatically pass out of the picture. I mean, there is no equivocation about that.

Now, we have no quarrel, of course, with the railroads. We feel that they are indispensable in the transportation [fol. 274] picture of this country; but by the same token, then, the barge lines have a place in that transportation picture, too; and we think they both are entitled to a fair rate structure that will permit them to exist and develop in their respective spheres.

Now, the all rail route furnishes a superior service to that of the barge rail route. That is definitely decided, and I think your Honors can find that definitely pointed out in the record in this particular case. Now, there is not going to be any one in particular, I mean the rail lines as they exist, are not going to pass entirely out of the picture in the event

the joint barge-rail rates are approved, and found justified, as the Commission has found them justified, in this proceeding. Where a shipper desires expedited service, he is going to use all rail routes. Where he finds time is not an element, he will use the barge-rail routes. So then we have two modes of transportation, competing one with the other, as I said before, within their respective spheres.

Now, we have here two interveners on behalf of the complainants, one, the Savannah interests to the east of us, and one the Texas interests to the west of us. I can very briefly answer both of them by saying that while Section 3.1 [fol. 275] of the Interstate Commerce Act is a statutory pronunciation of Congress, I think that counsel overlooked the fact that Section 3.1 says very specifically there must be no undue preference or prejudice. The fact that New Orleans is served by the Mississippi River establishes a geographical location, in my opinion, that New Orleans cannot be deprived of. The Commission has said that in innumerable decisions, and the Supreme Court has so found.

Judge Lindley: I think your time is up, Mr. Schwartz.

Mr. Schwartz: I rest my argument on the argument of counsel for the defendants and interveners.

Judge Lindley: Is that all for the defendants?

Mr. Hickey: I wonder if I may just take a moment. I refer to a very recent report of Congress, that is not readily available. I would like to hand this to the Court.

Judge Lindley: You may hand it up. Mr. Spencer, have you a word in reply?

ARGUMENT BY MR. SPENCER

Mr. Spencer: I would like two or three minutes to reply, if your Honor please. We pointed out in our brief that this case does not involve direct subsidies to the barge lines. It only involves indirect subsidies due to their operating losses and their arbitrary division of traffic for barge lines.

[fol. 276] Judge Lindley: What about their private lines that do not operate at a loss?

Mr. Spencer: They carry a very, very small amount of traffic.

Judge Lindley: They say they are operating without loss. How does your argument apply to them?

Mr. Spencer: We merely say that these rates should not be applied except where they are justified. We pointed out

that our theory was that the report of the Commission shows that the legal theory adopted by them was that these barge lines should have these differentials regardless of any of the evidence, and that is the only theory that any of counsel have put forth today, and we think that is clear.

I would like to call the Court's attention to the fact that the effective date of the order for all practical purposes is January 1st, 1950.

Judge Sullivan: January 31st.

Mr. Spencer: It is effective January 31, 1950, on thirty days' notice, which requires the tariffs to be filed by January 1st; otherwise they would be in violation of the order.

Judge Igoe: What do you suggest here, that we ought to speed this up, or that you want an extension?

[fol. 277] Mr. Spencer: I would like to have the Commission extend the time, if the Court desires it.

Judge Igoe: I think the Commission ought to do that, because we are not going to arrive at a decision here before the first of the year.

Judge Sullivan: That is January 31st.

Judge Igoe: No, it goes into effect thirty days after the 1st of January.

Mr. Spencer: The order of the Commission required rates be published effective January 31st, but on thirty days' notice. The tariffs have to be on file by the 1st of January.

Judge Igoe: So your deadline is the 1st of January?

Mr. Spencer: The 1st of January.

Judge Sullivan: What does counsel for the Commission say about that?

Mr. Reidy: Following the Commission's usual policy, I am quite certain they would be glad to postpone the effective date of the order to meet the convenience of the Court. If the Court has any suggestion to make as to the length of time they would like, say sixty days, or ninety days, the Commission likes to make the extension order for a definite period rather than an indefinite one.

[fol. 278] Judge Igoe: Sixty days?

Mr. Spencer: Sixty days.

Mr. Reidy: It is the request of the Court that the Commission postpone the effective date?

Judge Lindley: Yes. I am sure that will be plenty of time. Is this stenographic report to be written up and submitted to the Court?

Mr. Spencer: Yes sir.

Judge Lindley: We should like to have that. Does that conclude the oral presentation? Let the record show arguments heard and cause taken under advisement.

[fols. 279-280] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 281-282] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—December 15, 1949

This being the day on which this cause was set for hearing come the parties to this suit by their attorneys, respectively, and the hearing proceeds, the arguments of counsel are heard and disposition herein is hereby taken under advisement by the Court.

[fol. 283] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, et al., Plaintiff,

vs.

UNITED STATES OF AMERICA, et al., Defendant

Before Lindley, Circuit Judge; Sullivan and Igoe, District Judges

OPINION—Filed January 12, 1950

LINDLEY, Circuit Judge:

This is an action to set aside and enjoin the order of the Interstate Commerce Commission entered in a proceeding entitled *Rail and Barge Joint Rates, No. 26712.* The Commission, by order of October 8, 1934, instituted this proceeding as a general investigation into the lawfulness of differ-

entials then existing between all-rail rates and barge-rail rates, established by the Commission in the three years from April, 1929, to March, 1932. In the course of extensive hearings during the ensuing eight years, more than 16,000 pages of testimony and over 1,500 statistical exhibits were received in evidence. Upon conclusion of the hearings, an examiner submitted a report, to which exceptions and replies were filed by all interested parties. Following oral argument before the entire Commission, that body, on July 7, 1948, issued its report and order, which, as modified and corrected by its supplementary report of June 13, 1949, required common carriers by rail and water to establish joint rates over certain through routes specified in the report, these joint rates to be based upon the differentials prescribed in said report. Plaintiffs contend that the order is arbitrary and beyond the Commission's authority, and urge that it be set aside and its enforcement perpetually enjoined.

A brief history of the controversy which lies at the root of this cause may be of some assistance in its resolution. The Federal Control Act of March 21, 1918, which directed the Railroad Administration to establish water transportation [fol. 284] on certain inland waterways, was the first step in the attempted revival of water transportation on the Mississippi River and its tributaries, and the Warrior River. Before any conclusive evidence relative to the propriety of this undertaking was obtained, the war had ended, but Congress, in the Transportation Act of 1920, provided for continuation of the Mississippi-Warrior barge line service, directing that its operations be under the control of the War Department. Four years later, Congress created the Inland Waterways Corporation, of which the Secretary of War was the sole incorporator, and transferred to it the direction of this enterprise. This arrangement persisted until July 1, 1939, when supervision of the Inland Waterways Corporation, operator of the Federal Barge Lines, passed to the Department of Commerce. Meanwhile, privately owned and operated common carriers by water had become active on the Mississippi, and this fact impelled Congress to include in the Transportation Act of 1940 (Part III of the Interstate Commerce Act) a comprehensive plan for regulation, by the Interstate Commerce Commission, of all water carriers engaging in interstate commerce, this legislation having as its declared purpose the preservation of the inherent ad-

vantages of each mode of transportation through the impartial regulation of all.

In 1918, the Director General of Railroads, recognizing that shippers would not avail themselves of the slower, more hazardous barge service unless the barge rates were lower than the all-rail rates between the same points, determined that the port-to-port rates should be 80% of the all-rail rates between the same ports, and that the same differential should be applied to shipments moving through the same ports over joint rail-barge routes. This rate system was put into effect over certain through routes designated by the Director General. After 1920, when the War Department took control of Federal Barge Lines, unsuccessful attempts to persuade the railroads to enlarge the existing joint-rate structure culminated in the filing of a complaint with the Interstate Commerce Commission, in which Federal asked the Commission to prescribe joint rail-barge rates over a number of routes suggested by Federal. The Commission, observing that many of the proposed routes were [fol. 285] unduly circuitous and that there was insufficient evidence to enable it to determine which, if any, of the others should be established, suggested that joint rates over some of the routes might better be established through friendly negotiations with the rail lines. Some new joint rates were fixed in that fashion, but the results were, on the whole, so unsatisfactory that Congress, in 1928, passed the Denison Act, which directed the Commission to issue certificates of public convenience and necessity to common carriers by water on the Mississippi, the Warrior, and their tributaries, and, in the event the railroads refused voluntarily to establish through routes and joint rates with such carriers, authorized the Commission to establish such routes and rates and to "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service."

The Commission, acting under the authority conferred on it by this act, granted certificates of public convenience and necessity to Federal Barge Lines, Mississippi Valley Barge Line Company, and American Barge Line Company, and announced the so-called Ex Parte 96 formula for determining whether additional through routes proposed by the barge lines should be established. This formula, which was designed to avoid the establishment of through

routes which would be unduly circuitous or over which the barge line's portion of the joint haul would be so short that the interchange expense would offset the assumed economies of water transportation, provided that the joint rates over the routes which were established should incorporate the 20% differential first adopted by the Director General in 1918, except that, for such routes as barely met the distance requirements of the formula, the differential should be only 10% of the all-rail port-to-port rate. Railroad complaints attacking the reasonableness of the rates and differentials fixed pursuant to the Ex Parte 96 formula led the Commission to undertake the general investigation out of which the present controversy arises.

At the outset of this proceeding the railroads announced their intention of showing that, contrary to popular belief, the cost of transporting freight over barge-rail routes was [fol. 286] not less but, on the contrary, actually more than the cost of transporting it all-rail. The barge lines insisted that this was not true. Both sides introduced voluminous evidence relative to their respective costs of service, all of which was referred by the Commission to its cost section for study and interpretation. Although the cost section concluded generally that the cost of joint rail-barge shipping was greater than that incurred in direct all-rail routing and that this was due chiefly to the added terminal handling involved in joint rail-barge traffic, the Commission declined to review this conclusion or to make any finding as to relative all-rail and barge-rail costs in the period covered by the cost studies (1933-1938) because, as it said, "since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail." The Commission did state that "we cannot find that at the present time there are demonstrable economies in barge-rail transportation * * * which from the standpoint of cost of service would justify differentials." However the Commission felt that the proviso, in Section 307 (d) of the Transportation Act of 1940 (49 U. S. C. A. 907 (d)), that "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water," did not mean, as the railroads contended, that proof of lower cost of barge-rail service was a necessary condition precedent to the exercise of its

authority to prescribe differentials between all-rail and barge-rail rates, and, finding that the differentials set forth in the appendix to its report, were "justified as reasonable" and "necessary and desirable in the public interest," it ordered the railroads and the barge lines to establish joint rates based on such differentials. These differentials, it might be observed, do not result in the establishment of a wholly new system of joint barge-rail routes and rates; they are, rather, revisions of and additions to the rate structure created under the Ex Parte 96 formula, which was in effect when the Commission's general investigation was initiated. [fol. 287] The position of the plaintiffs, in short, is that, because the Commission could find no demonstrable economies in the barge-rail service which, from the standpoint of cost of service, would justify differentials, there is no legal basis for the Commission's order, based, as they say, solely on its belief that the order is in accord with Congressional intent and policy. They urge that the order, far from carrying out the intent of Congress, violates the national transportation policy, as declared in the Transportation Act of 1940, by depriving the railroads of their inherent advantage of lower cost of service and giving to the water carriers advantages to which they are not entitled on their merits and which Congress did not intend them to have. Finally, the plaintiffs contend that the order is not supported by basic findings of fact, and that this failure to disclose the basis on which the differentials were determined renders it arbitrary and unlawful. The United States, the Commission, and the intervening barge line defendants contend that the order is fully supported by findings based on substantial evidence and that it is in accord with Congressional policy and within the statutory authority of the Commission.

Plaintiffs, asserting that by the Commission's own rule, the basis for barge-rail differentials is that the service costs less and is worth less than rail service, argue that, because the Commission found no economies in barge-rail transportation which from the standpoint of cost of service would justify rate differentials, it was precluded from prescribing such differentials. That the Commission has, on numerous occasions, stated that the lower cost and lower value of water transportation provide the basis for the existence of rate differentials cannot be doubted. Inland

Waterways Corp. v. Alabama Great Southern R. Co., 151 I. C. C. 126, 144, Inland Waterways Corp. v. Aberdeen & R. R. Co., 183 I. C. C. 761, 765, but it has never indicated that proof of lower cost of service is an absolutely essential condition for creation of such differentials. Moreover, it is not at all clear that the lesser cost of the service, which is characterized as "the important factor," from the stand- [fol. 288] point of public policy, on which rate differentials are based, means lower *operating costs;* rather does it seem more likely that the phrase means lower *costs to the public.** And finally, plaintiffs' insistence that lower costs are essential to the existence of differentials completely ignores one of the fundamental principles of economics, namely, that the price of a product or a service is determined by its *value* to the consumer. Of course, operating costs incidentally affect the price by establishing a level below which the price cannot be allowed to fall, but, above that level, it is the value to the consumer which finally determines what the price will be.

In the instant case, assuming that the operating costs of the railroads are less than those of the barge lines, it does not follow that joint barge-rail rates should be equal to or greater than all-rail rates, for so to hold would be utterly to disregard the relative values of the respective services and, incidentally, to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service. More important, then, than the relative operating costs of rail and water carriers is the relationship between the rate charged by the rail carrier and the operating costs incurred by the water carriers. So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the

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* In I. C. C. v. Mechling, 330 U. S. 567, 580, the Supreme Court said: "* * * Congress knew that barge line rates were cheaper than rail rates, wanted the shippers to get full benefit of them, and left the Commission no power to take that benefit away from shippers by adjusting rail-barge traffic competition or rates."

superior service. Only when the rates charged by the railroads are so low that joint barge-rail freight cannot be transported profitably at a lower rate—i. e., when barge-rail [fol. 289] operating costs approach all-rail rates—will there be reason to deny the inferior service the right to exist.** In the joint rates established the railroads retain their regular rates; the differential between the all-rail rates and the rail-barge rates is absorbed by the barge lines.

The statutory provision empowering the Commission to prescribe differentials (Section 307 (d) of the Transportation Act of 1940) does not make the exercise of this power conditional on an affirmative showing of lower operating costs, but directs that "* * * the Commission shall prescribe such reasonable differentials as it may find to be justified * * *." As the Commission stated in its report, "Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is * * * an affirmative showing (of lower operating costs)."

Plaintiffs' contention that the order is not supported by basic findings of fact but is based solely on the presumed intent of Congress, and that it is, consequently, an arbitrary act without any legal basis must also be rejected. Although the Commission placed great emphasis on what it conceived to be the policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission. It was fully cognizant of the inferiority of the service afforded by the barge lines,*** a factor which

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** Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor.

*** On page 608 of its report, the Commission stated: "Much evidence was presented by shippers to show that from the standpoint of service barge transportation is inferior to all-rail. The principal disadvantage is the longer time involved. * * * Transfer of shipments from barge to railroad car or vice versa increases freight damages. * * * In the case of some commodities, barge transportation to some extent is conducive to deterioration or shrinkage on account of the slow transit, or contamination through contact with other freight."

it had previously designated as one basis for barge-line differentials. Inland Waterways Corp. v. Alabama Great Southern R. Co., 151 I. C. C. 126, 144. It regarded the shippers' evidence as "of significance because it indicates a [fol. 290] fairly unanimous view that the principal object in shipping by barge is to save transportation expense," and, aware that the abolition of differentials would end all barge-rail traffic, concluded that, in the light of the "clear Congressional policy" of aiding and encouraging the development of water transportation on the Mississippi and its tributaries, "joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified."

Turning to the prescription of specific differentials, plaintiffs assert that it is impossible to determine how they were arrived at, but, again, the Commission's report indicates otherwise. Comprehensive proposals for the establishment of differentials were under consideration by the Commission, which, while expressing its belief that "the requirement that the barge line absorb the differential in its division of the joint rate in and of itself provides some measure of safe-guard against the performance of uneconomical barge-and-rail service where the barge line is privately operated, "rejected certain differentials proposed by the Mississippi Valley Association because they "would be much too low to permit the barge lines to absorb the differentials without serious revenue effect." Weighing the merits of the various proposals, it found that Federal's proposal was "conservative with respect to the measure of the differentials;" and, pointing to Federal's experimental status, it concluded that "Federal should not be compelled to accept a lower level of joint rates than it considers necessary in the absence of evidence that its proposed rates would be unreasonably high." Although indicating that the Ex Parte 96 formula would not be rigidly adhered to because it had, in the past, produced "some unsatisfactory port relations and other inconsistencies," the Commission declared that "the circuity and relative-service restrictions in the formula are sound in principle" and rejected certain routes proposed by Valley because they were excessively circuitous.

From the foregoing discussion, it would seem apparent that the Commission, far from acting arbitrarily, fixed the

differentials only after due consideration of all the relevant [fol. 291] factors and evidence, and that they are the product of the Commission's expert, informed judgment on the subject. As the Supreme Court said in Ayrshire Collieries Corp. v. United States, 335 U. S. 573, 592, "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safe-guard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. • • • We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance, and competition differently than the Commission has done in this case. That is a task peculiarly for it. • • • The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked."

Plaintiffs, however, insist that the statutory requirements have not been met in this case,—that the order is not supported by basic findings of fact and that, contrary to the provisions of Section 307 (d) of the Transportation Act of 1940, it deprives the railroads of their inherent advantage of lower operating costs. Section 14 (1) of the Interstate Commerce Act, 49 U. S. C. A. 14 (1), provides: "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made." This statute would seem to provide the conclusive answer to plaintiffs' charge that the order is invalid because not supported by basic findings of fact, for it indicates that, except where damages are awarded, the report need not contain findings of fact expressly labelled as such. Here, subsequent to its investigation, the Commission made a "report in writing," setting forth its "conclusions" that barge-rail differentials, as prescribed, were reasonable, were justified, and were necessary and desirable in the public interest, together with its "order." Although the formal findings consisted only of findings of ultimate facts, the Commission's report, as has been pointed [fol. 292] out, discloses that those ultimate conclusions have ample support in the evidence and in informally stated

findings contained therein. The Supreme Court, recognizing that Section 14 (1) of the Interstate Commerce Act, relieves the Commission from making "comprehensive" findings of fact, has held that an order of the Commission is valid if supported by what it called "quasi-jurisdictional" findings, Florida v. United States, 228 U. S. 194, United States v. Baltimore & Ohio R. R. Co., 293 U. S. 454; here, the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seem to us to comprise the "quasi-jurisdictional" findings which the Supreme Court has declared essential.

The railroads' contention that the order deprives them of their inherent advantage of lower operating costs rests, of course, on the premise that the cost of shipping all-rail is, in fact, less than the cost of shipping barge-rail. However, in view of the fact that the cost information before the Commission was some ten years old, it seems obvious that the Commission was not required to find, on the basis of that evidence, that all-rail costs are lower than barge-rail costs; and, that the railroads' cost data was obtained by the use of average system costs based on the total freight traffic carried by the respective railroads and did not purport to represent the actual costs incurred in transporting barge-rail freight over the routes in question strengthens this conclusion. Baltimore & Ohio R. R. Co. v. United States, 298 U. S. 349, 380-381. The Commission, apparently of the opinion that the cost evidence before it was inadequate to support any affirmative finding as to relative costs,**** was, however, faced with certain obvious facts,—the sharp decline in joint barge-rail traffic in recent years, the high operating costs and ensuing financial difficulties encountered by Federal which, operating with outmoded equipment, [fol. 293] both terminal and floating, was the only one of the major barge lines to haul an appreciable amount of joint barge-rail freight, the virtual embargoes imposed on such

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**** The Commission's report states that "no useful purpose would be served by reviewing. . . . (the cost data) . . . with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail."

freight by the financially sound and better equipped Valley and American lines, all of which led it to state that "In the face of these facts, we cannot find that at the present time there are demonstrable economies in barge-rail transportation * * * which from the standpoint of cost of service would justify differentials." Such a negative conclusion, we think, cannot be said to constitute an affirmative finding that all-rail costs are lower than barge-rail costs; in the absence of such a finding, and in the absence of evidence requiring such a finding, the argument that the order deprives the railroads of the inherent advantage of lower costs must be rejected, for plaintiffs have failed to establish the premise on which the argument is based.

The position of the intervening complainants is that the order violates Sections 1 and 3 of the Interstate Commerce Act in that it gives New Orleans shippers an injust preference over shippers in Savannah, Houston, and Dallas respectively, by prescribing unreasonably low barge-rail rates, and that it, therefore, violates Article I, Section 9, Clause 6 of the Constitution, which prohibits a preference of the ports of one state over those of another. If the prescribed barge-rail differentials are reasonable and justified as between the barge lines and the railroads, as it seems to us they are, then the contention that the order prescribes unreasonably low barge-rail rates or unduly prefers New Orleans over Savannah and the Texas ports becomes, in effect, a complaint against any rate structure which provides to shippers who are in a position to transport their goods by water, rates which are lower than those available to shippers who are not so located. But it is not the function of the Commission to equalize natural geographic advantages; nor do such advantages constitute undue preferences within the meaning of Section 3 of the Interstate Commerce Act. The Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, where the Supreme Court, speaking through Mr. Justice Holmes, announced the principle, since adhered to by the Commission, that "The law does not attempt to [fols. 294-295] equalize fortune, opportunities, or abilities."

The contention that the Commission's order violates the ports-preference clause of the Constitution is, we think, settled by Commission v. Texas & N. O. R. Co., 284 U. S. 125, 131, in which the court said: "The clause of the Constitution invoked is: 'No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over

those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.' The specified limitations on the power of Congress were set to prevent preferences as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States." Moreover, in this case, the preference of which the intervenors complain is not given by a regulation of commerce but by a favorable geographic location.

The order of the Commission is sustained and the complaint of the plaintiff railroads, together with the complaints of the intervenors, are dismissed.

The findings of fact and the conclusions of law herein set forth are made a part of our more formal findings and conclusions of the same date.

Entered this 12th day of January, A. D. 1950.

William C. Lindley, Philip L. Sullivan, M. L. Igoe.

[fol. 296] In the United States District Court

[Title omitted]

Findings of Fact and Conclusions of Law—January 12, 1950

The court adopts the following findings of fact and conclusions of law:

Findings of Fact

1. The Interstate Commerce Commission on July 7, 1948, filed its report and order in Docket No. 26712, and related cases, Rail-and-Barge Joint Rates, 270 I. C. C. 591, in which, after full investigation, it found that through routes and joint rates of common carriers by railroad and common carriers by water on the Mississippi and Warrior Rivers and their tributaries, were necessary and desirable in the public interest, and wherein reasonable differentials between all-rail rates and joint-barge and rail rates were prescribed.

2. Docket No. 26712 was an investigation on the Commission's own initiative into—

> the reasonableness and lawfulness otherwise of existing through routes and joint rates, rules, regulations, and practices for application by common carriers by railroad and by common carriers by water operating upon the Mississippi and Warrior Rivers and their tributaries; the reasonableness of existing minimum differentials between all-rail rates and corresponding rail-barge, barge-rail, and rail-barge-rail rates; the necessity, if any, for the establishment by the aforesaid common carriers by railroad and by water of additional through routes and joint rates, rules, regulations, and practices; and for the fixing of reasonable minimum differentials if any, between the corresponding all-rail [fol. 297] rates and any such additional through routes and joint rates * * *

Other proceedings were consolidated for hearing in the same investigation. The all-rail rates, as such, were not put in issue under the Commission's order of investigation.

3. Extensive hearings were held before an Examiner of the Commission, at which much testimony and other evidence in the form of exhibits were introduced, all of which has been presented to this court. This evidence covered a wide range, and included testimony:

(a) With respect to cost of transportation service by rail, as compared to that by barge;

(b) With respect to results of traffic studies conducted by the railroads;

(c) With respect to the results of an investigation begun by Federal Barge Lines into costs of handling traffic on the lower Mississippi River, the upper Mississippi River, the Illinois Waterways and the Warrior Division;

(d) With respect to operating expenses, rents and taxes of the Mississippi Valley Barge Line;

(e) With respect to the age and carrying capacity of the barges, together with testimony showing modernization of equipment and terminals;

(f) With respect to stevedoring and cargo expenses in connection with transfer from barge to rail;

(g) With respect to the amount of traffic interchanged by the barge lines with the railroads;

(h) With respect to the sharp contraction of rail-barge traffic occurring during the war;

(i) With respect to the movement by barge southbound, compared with that northbound by barge, introduced by a considerable number of commercial witnesses;

[fol. 298] (j) With respect to the inferiority of service by water as compared with service by rail, and showing that the barge-rail rates would not be used except at rates differentially lower than the corresponding all-rail rates.

4. The record before the Commission also contained a comprehensive analysis of the existing rail-barge rate structure, showing inconsistencies therein, and comprehensive traffic studies dealing with the effect of rates on the movement of traffic and differentials necessary to attract traffic to the rail-barge routes. There was considerable evidence introduced dealing with proposed differential rates which included studies as to the division to be allocated to participating barge carriers and rail carriers thereunder, and this testimony tended to show that the connecting rail carriers in the rail-barge route would receive substantially the same revenue as when said rail carriers participated with connecting rail lines in the handling of all-rail traffic. There was much evidence in the record developing savings to shippers using the barge service by reason of the use of differentials in the water portion of the through service, together with important evidence tending to show that the rail-barge service would not be used by shippers unless there were savings in the through charges in the form of differentials. There was also evidence with respect to competition of industries in the Mississippi Valley area with industries located coastwise, and the rail-barge rates needed to meet coastwise competition. Also, there was considerable testimony tending to show the illogical results in the Ex Parte 96 formula, and the effect of such formula upon shippers. Also there was evidence tending to show that through routes and joint rates between barge and rail lines, with accompanying differentials, were necessary and desirable in the public interest. Very comprehensive rate proposals of various water carriers and shippers were before the Commission and elaborate studies were presented by the

Barge Lines respondents in which their costs of operations were measured against the existing rail rate structure, with a view to showing that upon the basis of such comparisons, [fol. 299] the Barge Line respondents were able to provide differential rates at their own expense and thus effect savings to the shipping public. Cost figures also were presented by the railroads, and considered by the Commission's Cost Finding Section, and these, so far as the rail carriers were concerned, were based on system average figures for the entire body of railroad traffic in 1933-1934; testimony was also introduced showing that the actual rates maintained by the railroads on particular traffic studied are not based upon, or in proportion to the average system costs.

5. The hearings were concluded in March, 1943, and voluminous briefs were filed by the parties in interest.

6. An Examiner of the Commission on March 15, 1946, submitted a proposed report, making detailed findings of fact and recommendations, and upon consideration of this report and of the exceptions and replied thereto filed by interested parties, and following oral argument before the entire Commission on March 10 and 11, 1948, the Commission on July 7, 1948, issued its own report and order, making numerous subsidiary findings as well as the following ultimate findings:

> 1. We find that the amounts shown in appendix A and Appendix B are justified as reasonable differentials to be deducted from the present first-class all-rail rates to and from the key points therein named to determine joint first-class rates applicable to the transportation of property by the barge lines and railroad carriers which are respondents in this proceeding, and that joint rates on other classes and columns should be determined by application of the usual percentages to such joint first-class rates.
>
> 2. We find that joint commodity rates (not including commodities in bulk) from and to points, referred to in appendix A and appendix B over lines of the aforesaid respondents should be established in amounts which would bear the same ratio to the all-rail commodity rates from and to the same points as that between

the first-class all-rail rates and the first-class barge-and-rail rates from and to the same points, and that the differences between the all-rail and barge-and-rail commodity rates so established would be justified as differentials; provided, however, that this finding shall not affect the present barge-and-rail rates on sugar, in carloads, and shall not require the establishment of barge-and-rail commodity rate from New Orleans to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such desti- [fol. 300] nation from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans.

3. We find that the establishment of through routes and joint rates for the transportation of property subject to the differentials prescribed in findings 1 and 2 is necessary and desirable in the public interest.

4. We find that as a reasonable condition under which such through routes shall be operated, and barge-and-rail traffic over such routes shall be subject to the same transit arrangements as those which are available under the corresponding all-rail rates from and to the same points.

These ultimate findings of fact are supported by findings of evidentiary facts by the Commission which support the ultimate findings.

7. On June 13, 1949, in the light of objections made by some of the intervening plaintiffs herein, the Commission issued a supplemental report, in which it made considerable revision in Finding No. 2 in the original report, to the benefit and advantage of said intervening plaintiffs.

8. The Commission's order issued on June 13, 1949 has been postponed from time to time so that the effective date is now March 31, 1950.

9. The findings of the Commission are supported by substantial evidence and are not arbitrary or unreasonable.

Conclusions of Law

The Court sets forth the following as its Conclusions of Law:

1. The court has jurisdiction of the parties and of the subject-matter of this suit.

2. The Commission did not misinterpret the provisions of the statute in reaching its conclusions in this case, and its report and order of July 7, 1948 and June 13, 1949, as amended, are within the statutory authority of the Commission.

3. The findings of the Commission contained in its report and supplemental report are clearly sufficient to sustain its [fols. 301-302] order, and such findings are supported by substantial evidence, and have a rational basis upon which to rest.

4. The injunction should be denied and the complaint and intervening complaints should be dismissed.

Adopted and entered this 12th day of January, A. D. 1950.
Walter C. Lindley, Circuit Judge, Philip L. Sullivan, District Judge, M. L. Igoe, District Judge.

[fol. 303] In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action No. 49 C 1434

The Alabama Great Southern Railroad Company, et al., Plaintiffs,

v.

United States of America, Defendant,

and

Interstate Commerce Commission, et al., Intervening Defendants

Final Decree—January 12, 1950

This cause coming on to be heard before the undersigned, constituting a special district court of three judges con-

vened pursuant to 28 U. S. C. A. Sections 2284(1) and 2325, upon applications for interlocutory and permanent injunctions and being heard upon the evidence taken before the Interstate Commerce Commission and the report and supplemental report of the Commission, as well as upon the arguments and briefs of counsel; and the cause having been submitted for final decree, and the court having made [fols. 304-305] its findings of fact and conclusions which are filed herewith;

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the opinion of the court herewith filed:

It is ordered, adjudged and decreed, that the injunction and other relief prayed for in the complaint and intervening complaints be denied and that the suits be dismissed.

This the 12th day of January, 1950.

Walter C. Lindley, United States Circuit Judge.
Philip L. Sullivan, United States District Judge.
M. L. Igoe, United States District Judge.

[fol. 306] In the United States District Court

[Title omitted]

Petition for Appeal to the Supreme Court of the United States—Filed March 7, 1950

Now come The Alabama Great Southern Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; Erie Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Kewaunee, Green Bay and Western Railroad Company; Litchfield and Madison Railway Company; Louisville and Nashville Railroad Company;

Missouri-Kansas-Texas Railroad Company; Guy A. Thompson, Trustee, Missouri Pacific Railroad Company; New Orleans and Northeastern Railroad Company; The New York Central Railroad Company; The Pennsylvania Railroad Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Railway Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; and Wabash Railroad Company; plaintiffs in the above-entitled cause, [fol. 307] and, considering themselves aggrieved by the final decree and order of this Court entered herein on January 12, 1950, hereby pray an appeal from the said final decree and order to the Supreme Court of the United States.

The particulars wherein the said plaintiffs consider the decree of this Court erroneous are set forth in an assignment of errors filed herewith.

Pursuant to rule 12 of the Supreme Court of the United States, as amended, there is also presented to this Court herewith a statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the said final decree and order of this Court.

Wherefore, the said The Alabama Great Southern Railroad Company, et al., pray that their appeal to the Supreme Court of the United States be allowed and that a citation be issued as provided by law; that an order be entered fixing the amount of bond for costs on appeal; and that a transcript of the record, proceedings, and documents upon which said decree and order was based, duly authenticated, be transmitted to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Harold E. Spencer, Robert H. Bierma, Harry E. Boe, Charles Clark, Frank H. Cole, Jr., L. P. Day, [fols. 308-309] James A. Gillen, Roland J. Lehman, Y. D. Lott, Jr., John E. McCullough, Toll R. Ware, Attorneys for plaintiffs.

March 7, 1950.

[fol. 310] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 7, 1950

Now come The Alabama Great Southern Railroad Company, et al., plaintiffs in the above-entitled action, and file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final decree and order of this Court entered January 12, 1950:

(1) The Court erred in failing to set aside, annul, suspend, and enjoin the order of the Interstate Commerce Commission entered June 13, 1949, in *Rail and Barge Joint Rates*, No. 26712 on the Commission's docket.

(2) The Court erred in failing to set aside the order of the Commission on the ground that the establishment of differentials in favor of the inferior barge-rail service, without a finding that the service costs less to perform than all-rail service, deprives plaintiffs of their inherent advantages of lower cost of service and superiority of service in violation of the national transportation policy.

(3) The Court erred in finding or holding that, under the circumstances of this case, differentials in favor of barge-[fol. 311] rail service might be justified by the inferiority of the barge-rail service as compared with all-rail service.

(4) The Court erred in failing to set aside the order of the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are just and reasonable and in the absence of preliminary and subsidiary findings on which such an ultimate finding could rationally be based.

(5) The Court erred in failing to set aside the order of the Commission on the ground that the Commission's finding that differentials between all-rail rates and joint barge-rail rates are justified is inconsistent with, unsupported by, and contrary to its finding that it could not find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries which, from the standpoint of cost of service, would justify differentials.

(6) The Court erred in failing to set aside the order of the Commission on the ground that, where the Commission has found no demonstrable economies in barge-rail transportation which, from the standpoint of cost of service, would justify differentials, the Commission is without power to establish differentials on the theory that they are required by the policy of Congress with respect to water transportation.

(7) The Court erred in finding that the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, comprise the "quasi-jurisdictional" findings which the Supreme Court has declared essential.

(8) The Court erred in finding that it is not clear that the lesser cost of service, which has been characterized by [fol. 312] the Commission as "the important factor," from the standpoint of public policy, on which rate differentials in favor of barge-rail routes are based, means lower operating costs and that it is more likely that the phrase means lower costs to the public.

(9) The Court erred in finding that more important than the relative operating costs of rail and water carriers is the relationship between the rate charged by the rail carriers and the operating costs incurred by the water carriers, although there are no findings by the Commission as to the relationship between the rate charged by the rail carriers and the operating costs incurred by the water carriers.

(10) The Court erred in finding that operating costs incidentally affect the price of a service by establishing a level below which the price cannot be allowed to fall, although it plainly appears from the face of the Commission's report that the Inland Waterways Corporation (Federal Barge Lines) for the 23 years of its existence from 1925 to 1947, inclusive, operated at an aggregate net deficit from water-line operations of $5,575,905, thus obviously selling its services at less than cost.

(11) The Court erred in finding that so long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain in that the rate fixed for the inferior

service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service, although the Commission made no finding that the all-rail rates were greater than the operating costs incurred in the transportation of barge-rail freight, although there is no finding by the Commission that the barge-rail rates are fixed somewhere in the region between the barge-rail operating cost and the [fol. 313] all-rail rates, and although it is plainly apparent from the face of the Commission's report that the barge-rail rates applicable by the Federal Barge Lines are below the cost of rendering the service as shown by the aggregate net deficit from water-line operations incurred by Federal.

(12) The Court erred in failing to set aside the order of the Commission on the ground that the Commission's order was based upon a misconstruction of the Interstate Commerce Act and the national transportation policy.

(13) The Court erred in holding that the Commission did not misinterpret the provisions of the Interstate Commerce Act in reaching its conclusions in this case and that the report and order of the Commission are within the statutory authority of the Commission.

(14) The Court erred in failing to set aside the order of the Commission on the ground that the differentials established are not justified by transportation circumstances and conditions.

(15) The Court erred in failing to set aside the order of the Commission on the ground that the order lacks the necessary rational basis required of orders of administrative agencies.

(16) The Court erred in failing to set aside the order of the Commission on the ground that the order was not adequately supported by findings of the Commission.

(17) The Court erred in failing to set aside the order of the Commission on the ground that the order was not adequately supported by substantial evidence.

(18) The Court erred in finding that, although the Commission placed great emphasis on what it conceived to be the [fol. 314] policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission.

(19) The Court erred in finding that the Commission fixed the differentials only after due consideration of all the relevant factors and evidence.

(20) The Court erred in finding that the Commission's ultimate findings of fact are supported by findings of evidentiary facts.

(21) The Court erred in finding that the findings of the Commission are supported by substantial evidence and are not arbitrary or unreasonable.

(22) The Court erred in finding or holding that the findings of the Commission contained in its report and supplemental report are clearly sufficient to sustain its order and that such findings are supported by substantial evidence and have a rational basis on which to rest.

(23) The Court erred in failing to find that, in entering its order of June 13, 1949, the Commission erred, misconstrued the law, violated the intent of Congress expressed in the national transportation policy, and acted arbitrarily, capriciously, unlawfully, contrary to and without support in the evidence, and without support of basic and essential findings of fact.

(24) The Court erred in dismissing plaintiffs' complaint.

Wherefore, the said plaintiffs, The Alabama Great Southern Railroad Company, et al., respectfully pray that the final decree and order of the District Court entered Jan-
[fols. 315-345] uary 12, 1950, dismissing the complaint of plaintiffs herein, be reversed and that such other and appropriate relief be granted as to the Court may seem just and proper.

Harold E. Spencer, Robert H. Bierma, Harry E. Boe, Charles Clark, Frank H. Cole, Jr., L. P. Day, James A. Gillen, Roland J. Lehman, Y. D. Lott, Jr., John E. McCullough, Toll R. Ware, Attorneys for plaintiffs.

Dated, March 7, 1950.

[fol. 346] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—March 7, 1950

The Alabama Great Southern Railroad Company; the Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; Erie Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Kewaunee, Green Bay and Western Railroad Company; Litchfield and Madison Railway Company; Louisville and Nashville Railroad Company; Missouri-Kansas-Texas Railroad Company; Guy A. Thompson, Trustee, Missouri Pacific Railroad Company; New Orleans and Northeastern Railroad Company; The New York Central Railroad Company; The Pennsylvania Railroad Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Railway Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; and Wabash Railroad Company; having filed their petition for an appeal to the Supreme Court of the United States from the final decree and order of this Court entered on January 12, 1950, dismissing the complaint [fols. 347-348] of the said The Alabama Great Southern Railroad Company, et al., in the above-entitled cause, and having also filed their assignment of errors and statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the said final decree and order of this Court, and having in all respects conformed to the statutes and rules of court in such cases made and provided;

It is, therefore, ordered and adjudged that an appeal to the Supreme Court of the United States as prayed for be and the same is hereby allowed.

It is further ordered that a citation issue, returnable within forty days from the date hereof;

It is further ordered that a certified copy of the record, proceedings, and documents upon which said final decree and order was based be transmitted to the Supreme Court of the United States under the rules of the Supreme Court in such cases made and provided.

It is further ordered that the said The Alabama Great Southern Railroad Company, et al., give bond as security for costs on appeal in the sum of $250.

Enter:

Igoe, United States District Judge.

Dated, March 7, 1950.

[fols. 349-352] Bond on appeal for 250.00 approved and filed March 7, 1950, omitted in printing.

[fols. 353-359] Citation in usual form showing service on Otto Kerner, Jr., et al., filed March 14, 1950, omitted in printing.

[fols. 360-367] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING TRANSMITTAL OF ORIGINAL EXHIBITS—March 7, 1950

On motion of The Alabama Great Southern Railroad Company, et al., plaintiffs herein,

It Is Ordered That all of the original exhibits received in evidence in this Court at the trial of this case on December 15, 1949, be certified and transmitted to the Supreme Court of the United States, in lieu of copies thereof, as part of the transcript of the record on appeal.

Enter, Igoe, U. S. District Judge.

Dated, March 7, 1950.

[fol. 368] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 7, 1950

Intervening complainants, Galveston Chamber of Commerce and Houston Port and Traffic Bureau, feeling themselves aggrieved by the decree of the Court entered herein on the 12th day of January, 1950, for the reasons set forth in their assignment of errors which is filed herewith, hereby pray an appeal to the Supreme Court of the United States from the said decree which dismissed their complaint seeking to have set aside, annulled and enjoined an order of the Interstate Commerce Commission, and further pray that an order be entered fixing the amount of bond and security to be given by the intervening complainants, as appellants, conditioned as the law directs.

The errors for which your petitioners claim to be entitled to the appeal herein prayed for are more fully set out in the assignment of errors filed with the Clerk of this Court pursuant to Rule 9 of the Rules of the Supreme Court of the United States; and there has been likewise filed herewith the statement required by Rule 12 of said Rules dis-[fols. 369-370] closing the basis for the jurisdiction of the Supreme Court of the United States to review said decree.

Wherefore, in order that your petitioners may obtain relief in the premises and have an opportunity to show the errors complained of, your petitioners pray for an allowance of an appeal in this case to the Supreme Court of the United States pursuant to the statutes and rules of said Court; that a true copy of the material parts of the record herein, including the assignment of errors, be made and transmitted to said Court in the manner and form prescribed by Rule 10 of the Rules of said Court; and that such further order or orders be made as may appear to this Court necessary or proper for the allowance of the appeal herein prayed.

Respectfully submitted, Wm. A. Disque, Attorney for intervening complainants.

March, 1950.

Wm. A. Disque, 70 Rust Building, 1001 15th St., N.W., Washington 5, D. C. Resident Counsel, Wayne M. Hoffman, 135 East Eleventh Place, Chicago 5, Ill.

[fol. 371] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 7, 1950

Intervening complainants, Galveston Chamber of Commerce and Houston Port and Traffic Bureau, file the following assignments of error on which they will rely in their appeal to the Supreme Court of the United States from the Final Decree of this Court entered on the 12th day of January 1950.

The Court erred:

1. In failing to set aside, annul, suspend and enjoin the order of the Interstate Commerce Commission of June 13, 1949, in its Docket No. 26712, entitled *Rail and Barge Joint Rates.*

2. In finding that the Commission's ultimate findings of fact are supported by findings of evidentiary facts by the Commission which support the ultimate findings.

3. In holding that the findings of the Commission are clearly sufficient to sustain its order and that such findings are supported by substantial evidence, have a rational basis upon which to rest, and are not arbitrary.

[fol. 372] 4. In holding that the Commission did not misinterpret the provisions of the Interstate Commerce Act in reaching its conclusions in this case.

5. In holding that the Commission's reports and order prescribing the rail-barge rates are within the statutory authority of the Commission.

6. In finding that neither the wording nor the legislative history of section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d) supports the conclusion that differentials are justified only where there is an affirmative showing of lower operating costs for barge-rail than for all-rail transportation.

7. In not finding that the Commission construed the differential provision of Section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d), as a mandate for differential barge-rail rates regardless of the showing that costs are at least as great for barge-rail as for all-rail transportation.

8. In not finding that the record in the case before the Commission afforded no facts on which differentials could be justified for barge-rail rates between New Orleans, La., and interior points west of the Mississippi River.

9. In not holding that the Commission had arbitrarily and unlawfully prescribed differential rail-barge rates for New Orleans.

10. In not holding that as the carriers themselves, under Section 3(1) of the Interstate Commerce Act, 49 U. S. C. [fol. 373] § 3(1), could not unduly prefer New Orleans and subject Galveston and Houston, Tex., to undue prejudice and disadvantage, the Commission itself could not lawfully do so.

11. In not holding that the Commission failed to adequately recognize and evaluate the evidence of the Texas interveners and likewise the railroads' general evidence insofar as it affects rail-barge transportation between New Orleans and the interior points west of the Mississippi River; and failed to make proper and necessary findings of fact and state its conclusions on the issues presented.

12. In not holding that the evidence of record would support findings and conclusions that any differential barge-rail rates between New Orleans and the interior western points are and would be unduly preferential of New Orleans and unduly prejudicial to Galveston and Houston interests, in violation of Section 3(1) of the Interstate Commerce Act, 49 U. S. C. § 3(1).

13. In not holding that the evidence of record would support findings and conclusions that rates such as the Commission prescribed for New Orleans would bear an unreasonable relation to the rates between Galveston and Houston, on the one hand, and the interior points, on the other, and be below reasonable minima, in violation of Section 1(5)(a) of the Interstate Commerce Act and the National Transportation Policy declared on the opening page of that Act.

[fol. 374] 14. In not holding that the Commission unlawfully failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for rail-barge rates for New Orleans.

15. In not holding that the Commission's reports and its order lack findings and conclusions essential to their constitutional and statutory validity respecting all rates prescribed and particularly those between New Orleans and interior points west of the Mississippi River.

16. In not holding that Finding 2 of the Commission, as revised in the supplemental report, is arbitrary because the proviso therein undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure, disregarding the barge haul altogether.

17. In not holding that Finding 1 of the Commission is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, although the necessity for a limitation on the entire differential system is recognized in principle by the proviso in Finding 2.

18. In not holding that if the Commission is correct in construing the differential provision of Section 307(d) of the Interstate Commerce Act, 49 U. S. C. § 907(d), as a mandate for rail-barge differentials for New Orleans regardless [fol. 375] of whether factual justification exists, that provision is unconstitutional, in violation of Article 1, Section 9, Clause 6 of the Constitution, because that provision prefers Louisiana and other States having ports served by inland waterway carriers over Texas and other States having ports not so served.

19. In holding that the preference of which the Galveston and Houston interveners complain is not given by a regulation of commerce, but by a favorable geographical location.

20. In not holding that by reason of the unconstitutional, arbitrary, capricious, and unlawful action of the Commission in entering its order of June 13, 1949, as to the prescribed barge-rail rates between New Orleans and the interior points west of the Mississippi River, the interveners are left without an adequate remedy at law and will be subjected to irreparable damage if the relief herein prayed for is not granted.

21. In dismissing the intervening complainants' complaint.

22. In the respects indicated in the Assignment of Errors filed in this case by the railroad complainants.

Wherefore, the intervening complainants pray that the decree of the District Court entered January 12, 1950, dismissing the case be reversed, that the District Court be directed to grant the relief prayed for and that such other [fols. 376-413] and appropriate relief be granted as to the Court may seem just and proper.

Respectfully submitted, Wm. A. Disque, Attorney for intervening complainants.

March —, 1950.

Wm. A. Disque, 70 Rust Building, 1001 15th Street, N. W., Washington 5, D. C.

Resident Counsel, Wayne M. Hoffman, 135 East Eleventh Place, Chicago 5, Ill.

[fol. 414] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—March 7, 1950

It appearing to the Court that intervening complainants, Galveston Chamber of Commerce and Houston Port and Traffic Bureau, have filed their petition for appeal to the Supreme Court of the United States, have filed therewith an Assignment of Errors and their statement as to the jurisdiction of the said Supreme Court, as required by Rule 12 of the Revised Rules of the Supreme Court of the United States, duly disclosing that the said Supreme Court has jurisdiction upon appeal to review the decree in question:

It is ordered, That the appeal prayed for be, and it is hereby, allowed and granted to the Supreme Court of the United States from the decree rendered in this case on the 12th day of January, 1950, and that the intervening complainants *[give] bond *[with good and sufficient security in the sum of] is hereby waived. *[dollars, ($——), that they, as appellants, shall prosecute their appeal to effect, and answer all costs if they fail to make their appeal good.]

[fols. 415-416] *And it is further ordered*, That citations issue returnable within forty (40) days from the date hereof.

Igoe, Judge.

Dated March 7, 1950.

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* Struck out in copy.

[fols. 417-426] Citation in usual form showing service on Otto Kerner, Jr., et al., filed March 14, 1950, omitted in printing.

[fol. 427] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 7, 1950

Intervening complainant Savannah Sugar Refining Corporation, feeling itself aggrieved by the decree of the Court entered herein on the 12th day of January, 1950, for the reasons set forth in its assignment of errors which is filed herewith, hereby prays an appeal to the Supreme Court of the United States from the said decree which dismissed its complaint seeking to have set aside, annulled and enjoined an order of the Interstate Commerce Commission, and further prays that an order be entered fixing the amount of bond and security to be given by the intervening complainant, as appellant, conditioned as the law directs.

The errors for which your petitioner claims to be entitled to the appeal herein prayed for are more fully set out in the assignment of errors filed with the Clerk of this Court pursuant to Rule 9 of the Rules of the Supreme Court of the United States; and there has been likewise filed herewith the statement required by Rule 12 of said Rules [fols. 428-429] disclosing the basis for the jurisdiction of the Supreme Court of the United States to review said decree.

Wherefore, in order that your petitioner may obtain relief in the premises and have an opportunity to show the errors complained of, your petitioner prays for an allowance of an appeal in this case to the Supreme Court of the United States pursuant to the statutes and rules of said Court; that a true copy of the material parts of the record herein, including the assignment of errors, be made and transmitted to said Court in the manner and form prescribed by Rule 10 of the Rules of said Court; and that such further order or orders be made as may appear to this Court necessary or proper for the allowance of the appeal herein prayed.

Respectfully submitted, C. R. Hillyer, Attorney for intervening complainant.

March 7, 1950.

C. R. Hillyer, 135 South LaSalle Street, Chicago 3, Illinois.

[fol. 430] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 7, 1950

Now comes the Savannah Sugar Refining Corporation, intervening plaintiff in the above-entitled action, and files the following assignment of errors on which it will rely on its appeal to the Supreme Court of the United States from the final decree and order of that Court entered January 12, 1950:

The Court erred:

(1) In failing to set aside, annul, suspend, and enjoin the order of the Interstate Commerce Commission entered June 13, 1949, in *Rail and Barge Joint Rates,* No. 26712 on the Commission's docket.

(2) In failing to set aside the order of the Commission on the ground that the Commission's order was based upon a misconstruction of the Interstate Commerce Act and the national transportation policy.

(3) In holding that the Commission did not misinterpret the provisions of the Interstate Commerce Act in reaching its conclusions in this case and that the report and order of the Commission are within the statutory authority of the Commission.

[fol. 431] (4) In failing to set aside the order of the Commission on the ground that, where the Commission has found no demonstrable economies in barge-rail transportation which, from the standpoint of cost of service, would justify differentials, the Commission is without power to establish differentials on the theory that they are required by the policy of Congress with respect to water transportation.

(5) In finding or holding that, under the circumstances of this case, differentials in favor of barge-rail service might be justified by the inferiority of the barge-rail service as compared with all-rail service.

(6) In failing to find that the value of the service of the barge-rail routes in transporting sugar is as great or greater than the value of the service via the all-rail routes.

(7) In failing to set aside the order of the Commission on the ground that the establishment of differentials in favor of the inferior barge-rail service, without a finding that the service costs less to perform than all-rail service, deprives the intervening plaintiff of its inherent advantages of lower costs of rail service and superiority of rail service in violation of the national transportation policy.

(8) In failing to set aside the order of the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are just and reasonable.

(9) In failing to find that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates will be free from undue prejudice and unjust preference.

(10) In finding that the basis of the protest of the intervening complainants was to deprive competitors of the [fol. 432] advantage of their location on the rivers.

(11) In failing to find that the basis of the protest of complaining interveners was to protect their inherent advantage of low-cost economical rail service to competitive markets.

(12) In finding that the absorption by the barge line of all or part of the barge-rail differential on barge-rail traffic compensates the railroads for the loss of their through rail revenue on all-rail traffic.

(13) In failing to find that the absorption by the barge line of the barge-rail differential on barge-rail traffic, results in undue preference of said traffic and the shippers thereof, and undue prejudice of competing all-rail traffic and the shippers thereof.

(14) In failing to find that the authorization of commodity rates, as distinguished from class rates, rests upon a lack of evidence dealing with commodity rates, as duly found by the Examiner of the Commission, and deprives the public paying commodity rates of the full hearing required by the Statute as a basis for a lawful finding by the Commission.

(15) In failing to find that the differential rates prescribed by the Commission are "more or less arbitrary"

as found by the Commissioner who wrote the report of the Commission.

(16) In failing to find that the barge rail service via the Warrior river has always in the past and still continues to operate at a heavy financial loss.

(17) In failing to find that all economies of operation on the Warrior river have been exhausted and that the Federal barge line has abandoned all hope of successful operation, as found by the Examiner of the Commission.

[fol. 433] (18) In failing to find that public policy does not permit the charging one shipper an established reasonable all-rail rate, and charging a competitor a rate that does not pay for the service received, as found by the Examiner with respect to barge-rail service via the Warrior river.

(19) In failing to find that in competition with the uneconomical and wasteful service above described, the Savannah refinery has been compelled to absorb the difference between the barge-rail rates from New Orleans via the Warrior river, and the rail rates from Savannah to competitive markets in the sum of over $400,000.

(20) In failing to find that this heavy loss results in undue prejudice to the Savannah refinery and unjust preference of the New Orleans refineries in violation of Section 3 of the Act to Regulate Commerce, as found in the report of the Examiner of the Commission.

(21) Failure to find that it is not in accord with the national transportation policy declared in the Interstate Commerce Act to thus discriminate against all-rail shippers by depriving them of the inherent advantages of low-cost economical rail service.

(22) In failing to find that if the important and voluminous cost of service evidence was stale, it was because of the delays of the Commission in deciding the case, and that the failure to have such evidence supplemented deprived plaintiffs of the full hearing required by the statute.

(23) In not holding that if the Commission is correct in construing the differential provision of Section 307(d) of the Interstate Commerce Act, 49 U. S. C. § 907(d), as a mandate for rail-barge differentials for New Orleans regardless of whether factual justification exists, that pro-

vision is unconstitutional, in violation of Article 1, Section 9, Clause 6 of the Constitution, because that provision pre-
[fols. 434-460] fers Louisiana and other States having ports served by inland waterway carriers over Georgia and other States having ports not so served.

(24) In failing to find that, in entering its order of June 13, 1949, the Commission erred, misconstrued the law, violated the intent of Congress expressed in the national transportation policy, and acted arbitrarily, capriciously, unlawfully, contrary to and without support in the evidence, and without support of basic and essential findings of fact.

(25) In dismissing intervening plaintiff's complaint.

Wherefore, the said intervening plaintiff, Savannah Sugar Refining Corporation, respectfully prays that the final decree and order of the District Court entered January 12, 1950, dismissing the complaint of intervening plaintiff herein, be reversed and that such other and appropriate relief be granted as to the Court may seem just and proper.

C. R. Hillyer, Attorney for Intervening Plaintiff.

Dated, March 7, 1950.

[fol. 461] In the United States District Court

[Title omitted]

Order Allowing Appeal—March 7, 1950

It appearing to the Court that intervening complainant, Savannah Sugar Refining Corporation, has filed its petition for appeal to the Supreme Court of the United States, has filed therewith an Assignment of Errors and its statement as to the jurisdiction of the said Supreme Court, as required by Rule 12 of the Revised Rules of the Supreme Court of the United States, duly disclosing that the said Supreme Court has jurisdiction upon appeal to review the decree in question:

It is ordered, That the appeal prayed for be, and it is hereby, allowed and granted to the Supreme Court of the United States from the decree rendered in this case on the 12th day of January, 1950, bond is hereby waived.

[fols. 462-463] *And it is further ordered,* That citations issue returnable within forty (40) days from the date hereof.

Igoe, Judge.

Dated March 7, 1950.

[fols. 464-475] Citation in usual form showing service on Otto Kerner, Jr., et al., filed March 15, 1950, omitted in printing.

[fol. 476] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 10, 1950

Intervening complainant, Railroad Commission of Texas, feeling itself aggrieved by the decree of the Court entered herein on the 12th day of January, 1950, for the reasons set forth in their assignment of errors which is filed herewith, hereby prays an appeal to the Supreme Court of the United States from the said decree which dismissed its complaint seeking to have set aside, annulled and enjoined an order of the Interstate Commerce Commission.

The errors for which your petition- claims to be entitled to the appeal herein prayed for are more fully set out in the assignment of errors filed with the Clerk of this Court pursuant to Rule 9 of the Rules of the Supreme Court of the United States; and there has been [fols. 477-478] likewise filed herewith the statement required by Rule 12 of said Rules disclosing the basis for the jurisdiction of the Supreme Court of the United States to review said decree.

Wherefore, in order that your petitioner may obtain relief in the premises and have an opportunity to show the errors complained of, your petitioner prays for an allowance of an appeal in this case to the Supreme Court of the United States pursuant to the statutes and rules of said Court; that a true copy of the material parts of the record herein, including the assignment of errors, be made and transmitted to said Court in the manner and form prescribed by Rule 10 of the Rules of said Court; and that such order or orders be made as may appear to this Court

necessary or proper for the allowance of the appeal herein prayed.

Respectfully submitted, Price Daniel, Attorney General of Texas; Charles E. Crenshaw, Assistant Attorney General, Attorneys for intervening complainant.

March 10, 1950.

Resident Counsel, Wayne M. Hoffman, 135 East Eleventh Place, Chicago 5, Illinois.

[fol. 479] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 10, 1950

Intervening complainant, Railroad Commission of Texas, files the following assignments of error on which it will rely in its appeal to the Supreme Court of the United States from the Final Decree of this Court entered on the 12th day of January, 1950.

The Court erred:

1. In failing to set aside, annul, suspend and enjoin the order of the Interstate Commerce Commission of June 13, 1949, in its Docket No. 26712, entitled *Rail and Barge Joint Rates.*

2. In finding that the Commission's ultimate findings of fact are supported by findings of evidentiary facts by the Commission which support the ultimate findings.

[fol. 480] 3. In holding that the findings of the Commission are clearly sufficient to sustain its order and that such findings are supported by substantial evidence, have a rational basis upon which to rest, and are not arbitrary.

4. In holding that the Commission did not misinterpret the provisions of the Interstate Commerce Act in reaching its conclusions in this case.

5. In holding that the Commission's reports and order prescribing the rail-barge rates are within the statutory authority of the Commission.

6. In finding that neither the wording nor the legislative history of Section 307(d) of the Interstate Commerce Act, 49 U.S.C. 907 (d) supports the conclusion that differentials are justified only where there is an affirmative showing of lower operating costs for barge-rail than for all-rail transportation.

7. In not finding that the Commission construed the differential provision of Section 307 (d) of the Interstate Commerce Act, 49 U.S.C. 907 (d), as a mandate for differential barge-rail rates regardless of the showing that costs are at least as great for barge-rail as for all-rail transportation.

8. In not finding that the record in the case before the Commission afforded no facts on which differentials could be justified for barge-rail rates between New Orleans, La., and interior points west of the Mississippi River.

[fol. 481] 9. In not holding that the Commission had arbitrarily and unlawfully prescribed differential rail-barge rates for New Orleans.

10. In not holding that as the carriers themselves, under Section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1), could not unduly prefer New Orleans and subject Galveston and Houston, Texas, to undue prejudice and disadvantage, the Commission itself could not lawfully do so.

11. In not holding that the Commission failed to adequately recognize and evaluate the evidence of the Texas interveners and likewise the railroads' general evidence insofar as it affects rail-barge transportation between New Orleans and the interior points west of the Mississippi River; and failed to make proper and necessary findings of fact and state its conclusions on the issues presented.

12. In not holding that the evidence of record would support findings and conclusions that any differential barge-rail rates between New Orleans and the interior western points are and would be unduly preferential of New Orleans and unduly prejudicial to Galveston and Houston interests, in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1).

13. In not holding that the evidence of record would support findings and conclusions that rates such as the Commission prescribed for New Orleans would bear an [fol. 482] unreasonable relation to the rates between Galveston and Houston, on the one hand, and the interior points, on the other, and be below reasonable minima, in violation of Section 1(5)(a) of the Interstate Commerce Act and the National Transportation Policy declared on the opening page of that Act.

14. In not holding that the Commission unlawfully failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for rail-barge rates for New Orleans.

15. In not holding that the Commission's reports and its order lack findings and conclusions essential to their constitutional and statutory validity respecting all rates prescribed and particularly those between New Orleans and interior points west of the Mississippi River.

16. In not holding that Finding 2 of the Commission, as revised in the supplemental report, is arbitrary because the proviso therein undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure, disregarding the barge haul altogether.

17. In not holding that Finding 1 of the Commission is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, although [fol. 483] the necessity for a limitation on the entire differential system is recognized in principle by the proviso in Finding 2.

18. In not holding that if the Commission is correct in construing the differential provision of Section 307(d) of the Interstate Commerce Act, 49 U.S.C. § 907(d), as a mandate for rail-barge differentials for New Orleans regardless of whether factual justification exists, that provision is unconstitutional, in violation of Article 1, Section 9, Clause 6 of the Constitution, because that provision prefers Louisiana and other States having ports served by

inland waterway carriers over Texas and other States having ports not so served.

19. In holding that the preference of which the Galveston and Houston interveners complain is not given by a regulation of commerce, but by a favorable geographical location.

20. In not holding that by reason of the unconstitutional, arbitrary, capricious, and unlawful action of the Commission in entering its order of June 13, 1949, as to the prescribed barge-rail rates between New Orleans and the interior points west of the Mississippi River, the interveners are left without an adequate remedy at law and will be subjected to irreparable damage if the relief herein prayed for is not granted.

21. In dismissing the intervening complainant's complaint.

[fols. 484-521] 22. In the respects indicated in the Assignment of Errors filed in this case by the railroad complainants.

Wherefore, the intervening complainant prays that the decree of the District Court entered January 12, 1950, dismissing the case, be reversed, that the District Court be directed to grant the relief prayed for and that such other and appropriate relief be granted as to the Court may seem *m*ust and proper.

Respectfully submitted, Price Daniel, Attorney General of Texas; Charles E. Crenshaw, Assistant Attorney General, Attorneys for Intervening Complainant.

March 10, 1950.

Resident Counsel, Wayne M. Hoffman, 135 East Eleventh Place, Chicago 5, Illinois.

[fol. 522] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—March 10, 1950

It appearing to the Court that intervening complainant, Railroad Commission of Texas, has filed its petition for appeal to the Supreme Court of the United States, has filed therewith an Assignment of Errors and its statement as to the jurisdiction of the said Supreme Court, as required by Rule 12 of the Revised Rules of the Supreme Court of the United States, duly disclosing that the said Supreme Court has jurisdiction upon appeal to review the decree in question:

It is ordered, That the appeal prayed for be, and it is hereby, allowed and granted to the Supreme Court of the United States from the decree rendered in this case on the 12th day of January, 1950, and that the intervening com- [fols. 523-524] plainant, as appellant, shall prosecute its appeal to effect, and answer all costs if it fails to make its appeal good.

And it is further ordered, That citations issue returnable within forty (40) days from the date hereof.

Igoe, Judge.

Dated March 10, 1950.

[fols. 525-535] Citation in usual form showing service on Otto Kerner, Jr., et al., filed March 14, 1950, omitted in printing.

[fol. 536] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

JOINT PRAECIPE OF APPELLANTS FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Named Court:

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States pursuant to the three appeals allowed herein on March 7, 1950, and the appeal

allowed herein on March 10, 1950, this single praecipe being filed jointly on behalf of all of the appellants in connection with their several appeals, and to include in such transcript of record the following, to wit:

1. Complaint of The Alabama Great Southern Railroad Company, et al., filed September 20, 1949, and exhibits 1 to 4, inclusive, attached thereto.

2. Motion to intervene and interveners' complaint of Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas, filed October 28, 1949.

3. Order granting Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas leave to intervene, entered October 28, 1949.

4. Motion to intervene and intervener's complaint of Savannah Sugar Refining Corporation, filed October 28, 1949.

5. Order granting Savannah Sugar Refining Corporation leave to intervene, entered October 28, 1949.

[fol. 537] 6. Order setting cause for hearing on December 15, 1949, entered October 28, 1949.

7. Designation of three-judge court by the Honorable J. Earl Major, Chief Judge, U. S. Court of Appeals for the Seventh Circuit, filed November 4, 1949.

8. Intervention of the Interstate Commerce Commission, filed November 7, 1949.

9. Answer of the Interstate Commerce Commission, filed November 7, 1949.

10. Answer of the Interstate Commerce Commission to the intervening complaint of Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas, filed November 14, 1949.

11. Answer of the Interstate Commerce Commission to the intervening complaint of Savannah Sugar Refining Corporation, filed November 14, 1949.

12. Answer of the United States of America, filed November 21, 1949.

13. Answer of the United States of America to the intervening complaint of Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas, filed November 21, 1949.

14. Answer of the United States of America to the intervening complaint of Savannah Sugar Refining Corporation, filed November 21, 1949.

15. Motion of American Barge Line Company, Inland Waterways Corporation, d/b/a Federal Barge Lines, and Mississippi Valley Barge Line Company to intervene, filed November 23, 1949.

16. Pleading of intervening defendants American Barge Line Company, Inland Waterways Corporation, d/b/a Federal Barge Lines, and Mississippi Valley Barge Line Company, filed November 23, 1949.

17. Order granting American Barge Line Company, Inland Waterways Corporation, d/b/a Federal Barge Lines, and Mississippi Valley Barge Line Company leave to intervene, entered November 23, 1949.

18. Motion of Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, and New Orleans Traffic and Transportation Bureau to intervene, filed November 28, 1949.

19. Answer of intervening defendants Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, and New Orleans Traffic and Transportation Bureau, filed November 28, 1949.

20. Order granting Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, and New Orleans Traffic and Transportation Bureau leave to intervene, entered November 28, 1949.

21. Notice of hearing mailed by Clerk to defendants pursuant to Title 28 U. S. Code, section 2284, filed November 30, 1949.

[fol. 538] 22. Motion to show representation for Railroad Commission of Texas, filed December 13, 1949.

23. Order granting Price Daniel, Attorney General of Texas, leave to appear of record for Railroad Commission of Texas, entered December 13, 1949.

24. Stenographic transcript of proceedings before the Honorable Walter C. Lindley, the Honorable Michael L. Igoe, and the Honorable Philip L. Sullivan, constituting a three-judge District Court, at Chicago, Illinois, on December 15, 1949.

25. Plaintiffs' exhibit No. 1 received in evidence at the hearing in this cause before the three-judge District Court on December 15, 1949, consisting of certified copies of the testimony, exhibits, examiner's proposed report, oral argument, report of the Commission dated July 7, 1948, supplemental report of the Commission dated June 13, 1949, and order of the Commission dated June 13, 1949, in *Rail and Barge Joint Rates*, No. 26712 on the Interstate Commerce Commission's docket.

26. Order arguments heard and concluded and cause taken under advisement, entered December 15, 1949.

27. Opinion of the Court, filed January 12, 1950.

28. Findings of fact and conclusions of law of the Court, entered January 12, 1950.

29. Final decree and order of the Court, entered January 12, 1950.

30. Petition for appeal filed March 7, 1950, by plaintiffs, The Alabama Great Southern Railroad Company, et al.

31. Assignment of errors filed March 7, 1950, by The Alabama Great Southern Railroad Company, et al.

32. Statement as to jurisdiction of the Supreme Court of the United States on appeal, filed March 7, 1950, by The Alabama Great Southern Railroad Company, et al.

33. Order allowing appeal by The Alabama Great Southern Railroad Company, et al., entered March 7, 1950.

34. Bond for costs on appeal filed March 7, 1950, by The Alabama Great Southern Railroad Company, et al.

35. Citation dated March 7, 1950, in connection with the appeal of The Alabama Great Southern Railroad Company, et al., filed March 14, 1950.

36. Acknowledgment of service of citation on appeal in connection with the appeal of The Alabama Great Southern Railroad Company, et al.

37. Statement directing attention to the provisions of paragraph 3 of rule 12 of the Supreme Court of the United States, filed March 7, 1950, by The Alabama Great Southern Railroad Company, et al.

38. Order directing transmittal of original exhibits, entered March 7, 1950.

[fol. 539] 39. Acknowledgment of service of appeal papers in connection with the appeal of The Alabama Great Southern Railroad Company, et al.

40. Certificate of service of appeal papers in connection with the appeal of The Alabama Great Southern Railroad Company, et al.

41. Petition for appeal filed March 7, 1950, by Galveston Chamber of Commerce and Houston Port and Traffic Bureau.

42. Assignment of errors filed March 7, 1950, by Galveston Chamber of Commerce and Houston Port and Traffic Bureau.

43. Statement as to jurisdiction of the Supreme Court of the United States on appeal, filed March 7, 1950, by Galveston Chamber of Commerce and Houston Port and Traffic Bureau.

44. Order allowing appeal by Galveston Chamber of Commerce and Houston Port and Traffic Bureau, entered March 7, 1950.

45. Citation dated March 7, 1950, in connection with the appeal of Galveston Chamber of Commerce and Houston Port and Traffic Bureau, filed March 14, 1950.

46. Acknowledgment of service of citation on appeal in connection with the appeal of Galveston Chamber of Commerce and Houston Port and Traffic Bureau.

47. Notice of appeal filed March 7, 1950, by Galveston Chamber of Commerce and Houston Port and Traffic Bureau.

48. Certificate of service of appeal papers in connection with the appeal of Galveston Chamber of Commerce and Houston Port and Traffic Bureau.

49. Petition for appeal filed March 7, 1950, by Savannah Sugar Refining Corporation.

50. Assignment of errors filed March 7, 1950, by Savannah Sugar Refining Corporation.

51. Statement as to jurisdiction of the Supreme Court of the United States on appeal, filed March 7, 1950, by Savannah Sugar Refining Corporation.

52. Order allowing appeal by Savannah Sugar Refining Corporation, entered March 7, 1950.

53. Citation dated March 7, 1950, in connection with the appeal of Savannah Sugar Refining Corporation, filed March 15, 1950.

54. Acknowledgment of service of citation on appeal in connection with the appeal of Savannah Sugar Refining Corporation.

55. Notice of appeal, filed March 7, 1950, by Savannah Sugar Refining Corporation.

[fols. 540-541] 56. Certificate of service of appeal papers in connection with the appeal of Savannah Sugar Refining Corporation.

57. Petition for appeal filed March 10, 1950, by Railroad Commission of Texas.

58. Assignment of errors filed March 10, 1950, by Railroad Commission of Texas.

59. Statement as to jurisdiction of the Supreme Court of the United States on appeal, filed March 10, 1950, by Railroad Commission of Texas.

60. Order allowing appeal by Railroad Commission of Texas, entered March 10, 1950.

61. Citation dated March 10, 1950, in connection with the appeal of Railroad Commission of Texas, filed March 14, 1950.

62. Acknowledgment of service of citation on appeal in connection with the appeal of Railroad Commission of Texas.

63. Notice of appeal, filed March 10, 1950, by Railroad Commission of Texas.

64. Certificate of service of appeal papers in connection with the appeal of Railroad Commission of Texas.

65. This praecipe.

66. Certificate of service of praecipe.

67. All docket entries in their appropriate order.

Harold E. Spencer, 135 E. 11th Pl., Chicago 5, Ill., Attorney for The Alabama Great Southern Railroad Company, et al., Appellants; Wm. A. Disque, 70 Rust Bldg., 1001 15th St., Washington 5, D. C., Attorney for Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants; Price Daniel, Attorney General of Texas, Austin, Tex., Attorney for Railroad Commission of Texas, Appellant; C. R. Hillyer, 135 S. La Salle St., Chicago 3, Ill., Attorney for Savannah Sugar Refining Corporation, Appellant.

March 16, 1950.

[fol. 542] CERTIFICATE OF SERVICE OF PRAECIPE

I hereby certify that a true copy of the joint praecipe of appellants, The Alabama Great Southern Railroad Company, et al., Houston Port and Traffic Bureau, Galveston Chamber of Commerce, Railroad Commission of Texas, and Savannah Sugar Refining Corporation, in conection with the several appeals taken by them from the final decree and order of the District Court in the above-entitled proceeding, the original of which joint praecipe has been filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, was this day served by me upon each of the following counsel of record by registered mail:

Herbert A. Bergson, Assistant Attorney General, Department of Justice, Washington, D. C.

James E. Kilday, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

Otto Kerner, Jr., U. S. District Attorney, 450 U. S. Court House, Chicago, Ill.

[fols. 543-574] Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington, D. C.

Edward M. Reidy, Associate Chief Counsel, Interstate Commerce Commission, Washington, D. C.

Samuel H. Moerman, Investment Building, Washington, D. C.

Harry C. Ames, Transportation Building, Washington, D. C.

Robert N. Burchmore, John S. Burchmore, Nuel D. Belnap, 2106 Field Building, Chicago, Ill.

Louis A. Schwartz, 408 International Building, 611 Gravier Street, New Orleans 12, La.

William J. Fanning, 2106 Field Building, Chicago, Ill.

Dated at Chicago, Illinois, this 16th day of March, 1950.

Harold E. Spencer, Attorney for The Alabama Great Southern Railroad Company, et al., Appellants.

[fol. 575] In United States District Court

The Following Are the Docket Entries to and Including April 10, 1950

No. 49 C 1434

Alabama Great Southern R. R. Co., et al.

v.

United States of America, et al.

List of Attorneys

For Plaintiffs

Harold E. Spencer, 135 E. 11th Place, Chgo.
Robert H. Bierma, 652 Union Station, Chgo.
Harry E. Boe, LaSalle St. Station, Chgo.
L. P. Day, LaSalle St. Station, Chgo.
James A. Gillen, 547 W. Jackson Blvd., Chgo.
Roland J. Lehman, 1211 Railway Exchange, Chgo.

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*Out of Town Attorneys.

*Charles Clark, Southern Ry. System, Wash., D. C.
*Frank H. Cole, Jr., B. & O. R. R., Cincinnati, Ohio.
*Y. D. Lott, Jr., G. M. & O. R. R., Mobile, Ala.
*John E. McCullough, St. L., S. F. Ry. Co., St. Louis, Mo.
*Toll R. Ware, Missouri Pac. Bldg., St. Louis, Mo.

For Intervening Pltfs., Galveston Chambers of Commerce, Houston Port and Traffic Bureau, and R. R. Comm. of Texas

Wayne N. Hoffman, 135 E. 11th Place, Chgo.
*Wm. A. Disque, 70 Rust Bldg., 1001 15th St., Wash., D. C.
*Price Daniel, Atty. Genl. of Texas, Austin, Texas.
*Charles E. Crenshaw, Asst. Atty. Genl. of Tex., Austin, Texas.

For Intervening Pltf., Savannah Sugar Refining Corp.

C. R. Hillyer, 135 S. LaSalle St., Suite 1960, Chgo.

For Deft., United States of America

Otto Kerner, Jr., U. S. District Atty., Chgo., Ill.
*Wm. J. Hickey, Spec. Asst. to Atty. Genl., Wash., D. C.
*James E. Kilday, Spec. Asst. to Atty. Genl., Wash., D. C.
*Herbert A. Bergson, Asst. Atty. Genl., Wash., D. C.

For Intervening Deft., Interstate Commerce Commission

*Daniel W. Knowlton, Chief Counsel, Wash., D. C.
*Edward M. Reidy, Associate Chief Counsel, Wash., D. C.

For Intervening Defts., American Barge Line Co., Inland Waterways Corp., and Mississippi Valley Barge Line Co.

Nuel D. Belnap, John S. Burchmore, Robert N. Burchmore, Walter, Burchmore & Belnap, 135 S. LaSalle St., Room 2106, Chgo.
*Harry C. Ames, Trans. Bldg., Wash., D. C.
*Samuel H. Moerman, Investment Bldg., Wash., D. C.

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*Out of Town Attorneys.

For Intervening Deft., Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, and New Orleans Traffic and Trans. Bureau

William J. Fanning, 135 S. LaSalle St., Room 2106, Chgo.
*Louis A. Schwartz, 611 Gravier St., New Orleans, La.

[fol. 576] THREE JUDGE CASE, JS.: WALTER C. LINDLEY, C. J. J. Sullivan and J. Igoe, D. Js.: The Alabama Great Southern Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Indianapolis and Louisville Railway Company, Chicago Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Rock Island and Pacific Railroad Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, Erie Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, The Kansas City Southern Railway Company, Kewaunee, Green Bay and Western Railroad Company, Litchfield and Madison Railway Company, Louisville and Nashville Railroad Company, Missouri-Kansas-Texas Railroad Company, Guy A. Thompson, Trustee; Missouri Pacific Railroad Company, New Orleans and Northeastern Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Southern Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and Wabash Railway Company, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant

(D)

Interveners: Galveston Chamber of Commerce; Houston Port and Traffic Bureau; Railroad Commission of Texas; and Savannah Sugar Refining Corporation, Interstate Com-

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*Out of Town Attorneys.

merce Commission, Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau and the New Orleans Traffic and Transportation Bureau.

(See Underneath for Additional Attorneys)

[fol. 577] Additional Attorneys

Price Daniel, Attorney General of Texas.

Charles E. Crenshaw, Assistant Attorney General, Capitol Station, Austin, Texas.

Daniel W. Knowlton, Chief Counsel.

Edward M. Reidy, Associate Chief Counsel, For Interstate Commerce Commission, 3315 Interstate Commerce Commission Bldg., Washington 25, D. C.

Walter, Burchmore & Belnap, 2106 Field Bldg., CE. 6-0204.

(Here follows 4 Photolithographs, side folios 578-581)

THREE-JUDGE CASE

D. C. Form No. 106A

49C 1434 **DOCKET**

TITLE OF CASE

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, et al

vs.

THE UNITED STATES OF AMERICA

SEE ATTACHED LIST.

ATTORNEYS

(See attached sheet for addt'l. attys.)

For Plaintiff:

Robert H. Bierm , Harry A. Boe
Charles Clark, Frank H. Cole, Jr.
L.P. Day, James A. Gillen,
Roland J. Lehman, Y.D.Lott, Jr.
John E. McCullough, Toll R. Ware,
Harold E. Spencer
135 E. Eleventh Pl., Chicago (5)
(Address H. E. Spencer only)

For Defendant:

Hon.Otto Kerner,Jr.
U.S.Atty.,450 U.S.Ct.Hse.(4)

For Interveners:

C.R.Hillyer,135 S.LaSalle St.
(Wm.A.Disque,70 Fust Bldg.
1001 - 15th St.,N.W.,Wash.(5)DC)
Wayne M.Hoffman,135 E.11th Pl.(5
Wm. J. Fanning - 2106 Field
Bldg. (3) CE. 6-0204
Louis A. Schwartz,408 Internatl
Bldg.,611 Gravier St.,N.O.La.)

Basis of action: Suit to enjoin, set aside, annul, and suspend a certain order of the Interstate Commerce Commission made and entd. on 6/13/49.

Jury trial claimed by

, 19

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED	DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED
9-20-49	FEP	15 00					
OCT 20 1949	SCFT		15 00				
3		5 00					
3 7							
3-10							

ABSTRACT OF COSTS

TO WHOM DUE	AMOUNT

RECEIPTS, REMARKS, ETC.

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
9-20-49	Filed complaint and (7) copies (1)(Exs.)(JS-)	15 00		
9-20-49	Issued summons and (4) copies with copies of complaint c			
9-23-49	Fld. Security for Costs. (3)r			
10-4-49	Filed summons ret'd. served. 1 serv. $2.00 P			
	30 1949			
10-28-49	Fld. 4 Notcs. & 3 Mos. (1)(2)(2)(2)(1)(2)(2)			
" " "	Ord. Savannah Sugar Refining Corp. is given lv. to intervene herein-DRAFT-Igoe,J. (1)			
" " "	Ord. on their own mo., Galveston Chamber of Commerce, Houston Part & Traffic Bureau & Railroad Commission of Texas are given lv. to intervene herein-Igoe,J. Mld. notc. to attys., 10-31-49.			
" " "	Fld. Interveners' Complt. by Galveston Chamber of Commerce, Houston Port & Traffic Bureau, & Railroad Commission of Texas. (9)			
" " "	Fld. Intervener's Complaint of Savannah Sugar Refining Corp.(5)			
" " "	Ord. on plfs. mo., hrg. herein is set for Dec.15,1949-Igoe,J. Mld. notc. to attys., 10-31-49. r			
" " "	Fld. Letter (copy) addressed to Judge Major,C.J.,USCA. (1)r			
11-4-49	Filed Order designating Three Judge Case. (1)P			
11-7-49	Filed Intervention of the Interstate Commerce Commission.(1) and 2 copies.			
" " "	Filed Answer of the Interstate Commerce Commission. (8)jb and two copies.			
11-14-49	Filed answer of Interstate Commerce Commission to intervening complt. and two copies (7)			
" " "	Filed answer of Interstate Commerce Commission. to intervening complt.& 2 copies (7)			
11-15-49	Filed letter re: briefs. (1)			
" " "	Filed letter re: briefs and three judge Court. (3)			
11-18-49	Fld. Letter of W.C.Lindley,Judge, USECA, to Judge Igoe.(1)			
" " "	Fld. Letter of Wm.A.Disque to Judge Igoe. (2)			
" " "	Fld. Letter addressed to Judge Lindley. (1)			
11-21-49	Fld. Ans. of USA to Complaint. (3)			
" " "	Fld. Ans. of USA to Complt. of Intervening Plf. (Sugar Refining,etc.)(3)			
" " "	Fld. Ans. of USA to Complt. of Intervening Plfs.(Galveston Chamber of Commerce, et al.) (3)r			
11-23-49	Filed Notice (2)			
" " "	Filed Motion to intervene (1)			
" " "	Filed pleading of intervening defts. (2)			
" " "	American Barge Line Co, et al are given leave to intervene herein and to file an intervening pleading instanter-DRAFT-Igoe, J. (1) Mld. notice to attys. 11-25-49 P			
1-28-49	Filed Notice and Motion and Pleadings. (2)(1)(3)			
" " "	Baton Rouge Traffic Bureau, Inc., et al are given leave to intervene herein and to file their intervening pleading forthwith - DRAFT - Igoe, J. (1) Mld. notice to attys. 11-30-49 jb			
11-30-49	Fld. Notice of hearing set for Dec. 15, 1949. (1)			
" " "	Mld. Notice of hearing set for Dec. 15, 1949, pursuant to Title 28 U.S.Code, Section 2284, by registered mail. r			
12-5-49	Fld. Letter from Louis A. Schwartz, Atty. for certain interveners, addressed to Clerk. (1) r			

16—12026-1

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
12-13-49	Filed Notice (2)			
" " "	Filed Motion to show representation. (2)			
" " "	On his own motion, Price Daniel, Attorney General of Texas is given leave to appear of record for the R. R. Commission of Texas-Igoe, J.			
	Mld. notice to attys. 12-15-49 P			
12-15-49	Ord. argts. hrd. & concld. & cause taken under advemt.-Lindley, C.J., Sullivan, D.J., Igoe, D.J.			
	Mld. notc. to attys., 12-21-49. r			
1-12-50	Filed Memorandum and copies. (12)			
" " "	Enter Findings of Fact and Conclusions of Law-DRAFT-(6)			
" "	Enter Final Decree dismissing the complt. and denying the prayer thereof-DRAFT-C. J. Lindley and D. Js. Sullivan and Igoe (JS6) (2)			
	Mld. notice to attys. 1-17-50 P			
3-7-50	Filed Petition for Appeal to the U.S.S.C. of the pltfs. The Alabama Great Southern R.R. Co., et al. (3)	5 00	Pd.	
" " "	Filed Statement as to Jurisdiction, etc. of the pltfs.(28)			
" " "	Filed Assignment of Errors of the pltfs. (6)			
" " "	Filed Statement Directing Attention to the Provisions of Par. 2, Rule 12 of the U.S.S.C. (1)			
" " "	Filed Petition for Appeal of the Intervening complainants, Galveston Chamber of Commerce, et al. (2)	5 00	Pd.	
" " "	Filed Statement as to Jurisdiction, etc. of Galveston Chamber of Commerce, et al. (34)			
" " "	Filed Assignment of Errors of Intervening complainants, Galveston Chamber of Commerce, et al. (6)			
" " "	Filed Petition for Appeal of the Intervening complainant, Savannah Sugar Refining Corp. (2)	5 00	Pd.	
" " "	Filed Notice of Appeal of the Intervening complainant, Savannah Sugar Refining Corp. (3)			
" " "	Filed Statement as to Jurisdiction, etc. of Savannah Sugar Refining Corp., Intervening Pltf. (26)			
" " "	Filed Assignment of Errors of the Savannah Sugar Refining Corp. (5)			
" " "	Order allowing pltfs. to prosecute appeal herein - Bond fixed in the sum of $250.00 - DRAFT. Order allowing Galveston Chamber of Commerce, et al, intervenors, to prosecute appeal herein - Bond waived - DRAFT. Order allowing Savannah Sugar Refining Corp., intervenor, to prosecute appeal herein - Bond waived - DRAFT. Order directing Transmittal of original Exhibits - DRAFT-Igoe,J.(2)(2)(2)(1)			
	Mld. notice to attys. 3-7-50			
" " "	Filed Bond for Costs on Appeal jb			
" " "	Filed Notice of Appeal of the Intervening complainants, Galveston Chamber of Commerce, et al. (1) jb			
3-9-50	Filed Certificate of Service of Appeal Papers by H. E. Spencer, Atty. for Alabama Great Souther R.R. Co. et al.(2)			
" " "	Filed Acknowledgment of Service Of Appeal Papers (2)			
" " "	Filed Certificate of Service of Appeal Papers by Wayne M. Hoffman, Res. Atty. for Galveston Chamber of Commerce, Houston Port and Traffic Bureau (2) B			
3-10-50	Filed Certificate of Service of Appeal Papers by C.R. Hillyer, Res. Atty. for Savannah Sugar Refining Corp. (2) jb			

16-42756-1

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
3-10-50	Filed Petition for Appeal of the Railroad Commission of Texas. (2)			
" " "	Railroad Commission of Texas, intervening complainant, is given leave to appeal to the Supreme Court of the United States - DRAFT - Igoe, J. (2) Mld. notice to attys. 3-10-50			
" " "	Filed Notice of Appeal by the Railroad Comm. of Texas.(2)	5 00	Pd.	
" " "	Filed Assignment of Errors by the R.R. Comm. of Texas.(6)			
" " "	Filed Statement as to Jurisdiction, etc. of The Railroad Commission of Texas, intervening complainant. (35) jb			
3-14-50	Filed Certificate of Service of Appeal Papers by W. M. Hoffman, Res. Atty. for R.R. Comm. of Texas. (2)			
" " "	Filed Citation on Appeal re: Pltfs. (2)			
" " "	Filed Acknowledgement of Serv. of Citation on Appeal.(2)			
" " "	Filed Citation on Appeal and Acknowledgement of Service re: Galveston Chamber of Commerce and Houston Port and Traffic Bureau. (2)(2)			
" " "	Filed Citation on Appeal and Acknowledgement of Service re: Railroad Commission of Texas. (2)(2)jb			
3-15-50	Filed Citation on Appeal and Acknowledgement of Service re: Savannah Sugar Refining Corp. (2)(4)			
3-16-50	Filed Joint Praecipe of Appellants for Transcript of Record and Certificate of Service. (5)(2)jb			
3-22-50	Filed Motion to Affirm of Intervening Barge-Line Defts.			
3-23-50	Filed Acknowledgment of service of Citation on Appeal re: Alabama Great Southern R. R. Co. et al. (2)			
" " "	Filed Acknowledgment of service of Citation on Appeal re: Galveston Chamber of Commerce and Houston Port and Traffic Bureau. (2)			
" " "	Filed Acknowledgment of service of Citation on Appeal re: Savannah Sugar Refining Corp. (2)			
" " "	Filed Acknowledgment of service of Citation on Appeal re: Railroad Commission of Texas. (2)P			
3-24-50	Filed Transcript of Proceedings had before Honorable Walter C. Lindley, Michael L. Igoe and Philip L. Sullivan on Dec. 15, 1949 (98)P			
3-23-50	Filed Acknowledgment of service of Appeal Paper (2)			
3-23-50	Filed Motion to Affirm, by I. C. C. (12)r			
3-31-50	Filed Notice. (2)			
" " "	Lv. to amend plfs' statement as to jurisdiction.-DRAFT- Sullivan,J. (1) Mld. notc. to attys., 4-3-50. r			
4-10-50	Filed Pltfs'. Exhibit No. 1 consisting of 8 boxes and 1 package, etc. jb			

[fols. 582-583] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 584] EXCERPTS FROM PLAINTIFFS' EXHIBIT No. 1

Interstate Commerce Commission

No. 26712

Rail and Barge Joint Rates [1]

Submitted——— Decided———

Upon investigation of the lawfulness of through routes and joint rates of common carriers by railroad and common carriers by water on the Mississippi and Warrior Rivers and their tributaries: revised joint class rates prescribed.

Nuel D. Belnap, Luther M. Walter, John S. Burchmore, Helen W. Munsert, and Robert N. Burchmore for Inland Waterways Corporation; Harry C. Ames, Wilmer A. Hill, and Harry C. Ames, Jr., for Mississippi Valley Barge Line Company; Wilbur LaRoe, Jr., Frederick E. Brown, and

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[1] This report also embraces No. 26679, Baltimore & Ohio Railroad Company et al. v. American Barge Line Company; No. 26680, Akron, Canton & Youngstown Railway Company et al. v. Inland Waterways Corporation; No. 26681, Alton Railroad Company et al. v. Mississippi Valley Barge Line Company; Investigation and Suspension Docket No. 4032, Cotton from Arkansas via Rail-Barge-Rail; Investigation and Suspension Docket No. 4060, Green Coffee from New Orleans, La., to Texas; Investigation and Suspension Docket No. 4082, Barge Line Traffic from and to the Southwest; and the following proceedings on further hearing: No. 13290, The Secretary of War, Operating Mississippi-Warrior Service v. Aberdeen & Rockfish Railroad Company et al.; No. 18406, Inland Waterways Corporation, Operating Mississippi-Warrior Service v. Beaumont, Sour Lake & Western Railway Company et al.; No. 19017, Inland Waterways Corporation v. Chicago Great Western Railroad Company et al.; No. 19480, Inland Waterways Corporation, Operating Mississippi-Warrior Service et al. v. Alabama Great Southern Railroad Company et al.

Arthur L. Winn, Jr., for American Barge Line Company; water-carrier respondents.

Elmer A. Smith, Harry C. Barron, R. R. Bongartz, William C. Burger, Charles Clark, D. P. Connell, George F. Dyche, P. F. Gault, Walter McFarland, Toll R. Ware, A. H. Kiskaddon, B. F. Batts, J. N. Davis, A. S. Knowlton, R. J. Lehman, M. G. Roberts, C. H. Owen, F. J. Loughlin, H. R. Wilkinson, G. Wehnert, E. F. Stock, J. I. Bonner, E. Rigg, Harold Scherer, and P. J. Shepherd for rail-carrier respondents.

[fol. 585] T. E. Wood for Arkansas Corporation Commission; G. H. Shafer for Illinois Commerce Commission; Cornelius Lynde for State of Illinois; H. A. Hollopeter for State of Indiana; John C. DeMar, Harold E. Davidson, and Walter Condren for Iowa State Commerce Commission; Homer Hoch, J. F. Stevick, John F. Jones, Curtis S. Hunter, and I. C. Peterson for Kansas Corporation Commission; C. C. Stanfill and J. E. Marks for Kentucky Railroad Commission; P. A. Frye for Louisiana Public Service Commission; A. L. Flinn for Minnesota Railroad & Warehouse Commission; V. E. Smart for Missouri Pacific Service Commission; C. A. Ross for Nebraska State Railway Commission; Elmer W. Cart, S. S. McDonald, Ben C. Larkin, James M. Hanley, John M. Agrey, and J. C. Winter for North Dakota Board of Railroad Commissioners; C. B. Bee for Oklahoma Corporation Commission; William Williamson for South Dakota Public Utilities Commission; H. E. Ketner for Virginia State Corporation Commission; P. H. Porter, W. F. Ehman, and C. E. Schreiber for Wisconsin Public Service Commission.

C. E. Childe for Mississippi Valley Association.

Gayle Alden, Jr., J. R. Allen, V. Alexander, B. M. Angell, C. D. Arnold, H. M. Baker, Alonzo Bennett, I. G. Bentley, R. A. Bentley, E. H. Berg, D. H. Berry, Stuart B. Bradley, J. G. Breslin, E. D. Brown, Frank Buck, E. C. Bundy, T. J. Bustard, Ed. P. Byars, A. J. Christiansen, R. G. Cobb, D. A. Cole, H. J. Conley, P. D. Cook, E. A. Cooke, A. M. Corp, S. G. Creswick, G. B. Cromwell, H. B. Cummins, W. B. Daly, F. J. Danner, L. F. Daspit, J. R. Davy, H. A. Deane, C. C. Dehne, M. C. deQuevado, M. L. Dickerson, David Dunn, W. M. Dyer, A. R. Ebi, D. E. Edison, R. P. Ellis, L. D. Estes, A. W. Evans, H. R. Faison, W. H. Fitzpatrick, S. P. Gaillard, Jr., H. W. Gehrke, Carl Giessow, L. J. Gorin,

Harry Graham, M. A. Gray, H. M. Gregory, H. M. Hancock, Elisha Hanson, Charles M. Harrison, L. V. Hass, J. P. Haynes, C. O. Heinley, Samuel Herndon, C. R. Hillyer, Wade H. Hoffman, F. W. Hoffmokel, C. E. Holloman, H. J. Holsten, A. C. Hultgren, R. H. Judd, L. A. Keck, B. M. Keller, J. C. Keller, W. W. Klingensmith, E. E. Kohlwes, J. A. Kuhn, Leslie Lacroix, L. C. Landecker, E. F. Ledwidge, S. O. Lumpman, R. W. Marshall, M. W. Martin, C. E. Mayes, C. E. McDaniel, E. W. McKay, W. J. McMahon, W. C. McMurray, H. V. McNamara, H. S. McNeely, C. A. Mitchell, H. Morgenstern, Herman Mueller, J. C. Murray, P. J. Naughton, W. C. Newkirk, H. W. Nichols, G. L. Olsen, G. W. Orewiler, B. H. Overton, J. D. Patterson, E. L. Peterson, W. C. Pike, J. W. Porter, R. D. Portwood, R. O. Powelson, E. A. Rainold, C. F. Real, A. L. Reed, P. M. Ripley, F. G. Robinson, F. L. Ruland, E. J. Schlecht, Louis A. Schwartz, A. H. Schwietert, L. F. Sherer, S. B. Short, A. H. Simpson, S. A. Simpson, A. T. Sindel, H. B. Skinner, E. H. Smith, J. W. Stanard, P. H. Stephens, R. A. Stiegler, R. C. Stoelting, H. F. Sundberg, C. A. Talley, J. H. Tedrow, F. L. Thomas, E. H. Thornton, F. B. Townsend, Paul Van Treese, H. J. Wagner, A. C. Wall, E. Wallace, W. N. Webb, D. F. Weil, W. J. Westerman, W. M. Wharton, I. W. Whitaker, C. E. Widell, Francis Williams, N. E. Williams, E. E. Williamson, and Fred Zimmerman for other parties.

[fol. 586] REPORT PROPOSED BY HOWARD HOSMER, EXAMINER —Filed March 15, 1946

These proceedings comprehensively involve the lawfulness of the joint rates for barge-rail, rail-barge, and rail-barge-rail transportation of the Inland Waterways Corporation, operating the Federal Barge Lines, the Mississippi Valley Barge Line Company, and the American Barge Line Company,[2] which are the principal common carriers by water on the Mississippi and Warrior Rivers and their tributaries, and connecting railroad carriers.

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[2] These carriers are referred to in this report, respectively, as Federal, Valley, and American. Since these proceedings were started, other common carriers by water have established operations on these rivers, but they did not participate in the proceedings. The newer carriers have few joint rates with railroads.

The title case, No. 26712, is an investigation on the Commission's own initiative into—

> the reasonableness and lawfulness otherwise of existing through routes and joint rates, rules, regulations, and practices for application by common carriers by railroad and by common carriers by water operating upon the Mississippi and Warrior Rivers and their tributaries; the reasonableness of existing minimum [3] differentials between all-rail rates and corresponding rail-barge, barge-rail, and rail-barge-rail rates; the necessity, if any, for the establishment by the aforesaid common carriers by railroad and by water of additional through routes and joint rates, rules, regulations, and practices; and for the fixing of reasonable minimum reasonable differentials if any, between the corresponding all-rail rates and any such additional through routes and joint rates * * *.

There were consolidated for hearing with No. 26712, three formal complaints filed by rail carriers under the Denison Act,[4] assailing joint rates prescribed by the Commission under that Act in connection with Federal, Valley and American,[5] No. 26679, Baltimore & Ohio Railroad Company et al. v. American Barge Line Company; No. 26680, Akron, Canton & Youngstown Railway Company et al. v. Inland Waterways Corporation; and No. 26681, Alton Railroad Company et al. v. Mississippi Valley Barge Line Company. Investigation and Suspension Dockets Nos. 4032, 4060, and

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[3] When this proceeding was instituted, the Commission had no authority to prescribe minimum joint rates where one of the participants was a water carrier.

[4] Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924 (43 Stat. 361), repealed as of October 1, 1940, by the Transportation Act of 1940.

[5] *Through Routes and Joint Rates Between Inland Waterways Corp. and Other Common Carriers*, 153 I.C.C. 129, 156 I.C.C. 141, 161 I.C.C. 207, 163 I.C.C. 716, 167 I.C.C. 385, 172 I.C.C. 525, 192 I.C.C. 173, 192 I.C.C. 663; *Application of Mississippi Valley Barge Line Co.*, 167 I.C.C. 41, 171 I.C.C. 37, 178 I.C.C. 224, 182 I.C.C. 512, 183 I.C.C. 503, 192 I.C.C. 173; *Application of the American Barge Line Co.*, 182 I.C.C. 521, 185 I.C.C. 483, 190 I.C.C. 7, 192 I.C.C. 173.

4082, also assigned for consolidated hearing with the other proceedings are no longer of any practical importance. On petition of the rail carriers the Commission reopened for [fol. 587] further hearing Nos. 13290,[6] 19017,[7] 18406,[8] and 19480,[9] which arose on formal complaints filed by Federal and its predecessor, the War Department.

History and Description of Modern Barge Transportation on the Mississippi River System

Federal.—The revival of water transportation on the Mississippi and its tributaries (including the Warrior) dates from 1917, when freight movement on those streams appeared to be on the point of vanishing. Accepting the thesis of the promoters of water transportation in the Mississippi Valley that only through greater use of the rivers could the wartime traffic due to World War I be handled, Congress in the Federal Control Act directed the Railroad Administration to establish water transportation on certain inland waterways, including the Mississippi and the Warrior Rivers. Service on these rivers did not get under way until the latter part of 1918. Because of poor equipment and other difficulties the brief experiment with barge transportation as a war measure was inconclusive. In the Transportation Act of 1920 Congress provided for the continued operation of the Mississippi-Warrior Service, as it was then called, by the War Department. In 1924 the enterprise was acquired by the Inland Waterways Corporation, created by Act of Congress, of which the Secretary of War was the sole incorporator. The Corporation was transferred to the Department of Commerce July 1, 1939, and has since been supervised by that department.

Federal's first operations were between St. Louis, Mo., and New Orleans, La., on the Mississippi, and between New Orleans and a point now known as Port Birmingham,

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[6] *United States War Dept.* v. *Abilene & S. Ry. Co.*, 77 I.C.C. 317, 9 I.C.C. 528.

[7] *Inland Waterways Corp.* v. *Chicago, G.W.R. Co.*, 129 I.C.C. 521.

[8] *Inland Waterways Corp.* v. *Beaumont, S. L. & W. Ry. Co.* 142 I.C.C. 9.

[9] *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126.

Ala., by way of Lake Pontchartrain, Mississippi Sound, and the Black Warrior, Warrior, and Tombigbee Rivers (commonly referred to collectively as the Warrior). In 1927 Federal began operations between St. Louis and St. Paul, Minn. Four years later it started service on the Illinois River to Peoria, Ill., extended in 1933 to Chicago, Ill., over the Illinois Waterway. Federal's operations on the Missouri River between St. Louis and Kansas City, Mo., began in 1935.

Federal has 28 steel towboats each with an average indicated horsepower of 1,484. It has 178 steel dry-cargo barges, having an average capacity of 1,915 tons, which it uses on the Mississippi system, and 52 such barges with an average capacity of 500 tons in use on the Warrior. In addition, it owns 12 oil-cargo barges with an average capacity of 966 tons each.

[fol. 588] In 1944 Federal operated two scheduled tows each week between St. Louis and New Orleans, between St. Louis and the Twin Cities, and between St. Louis and Chicago. It had weekly scheduled service between Kansas City and St. Louis and between New Orleans and Mobile, Ala., and semi-monthly service between Port Birmingham and Mobile. Intermediate ports principally served were Baton Rouge, La., Vicksburg, Miss., Helena, Ark., Memphis, Tenn., and Cairo, Ill., on the lower Mississippi section, Rock Island, Ill., Burlington, Clinton, and Dubuque, Iowa, on the upper Mississippi sect , and Peoria on the Illinois River section. The service on the upper Mississippi was from April 1 to November 1 only. In some recent years operation on the Illinois River section has been possible throughout the year, but that on the Missouri River has been suspended in the winter.

Federal's tonnage increased rather steadily from a figure of 672,111 tons in 1921 to 2,767,210 tons in 1938, the largest volume it has ever handled. The average per year for the period from 1921 to 1930, inclusive, was 1,246,440 tons. For the period from 1931 to 1940, inclusive, the average was 1,886,275 tons per year. In the war period, 1941 to 1944, inclusive, the average was 2,347,799 tons. The ratio of traffic handled in connection with rail carriers to the total of Federal's traffic has declined in the past 15 years. In 1930 the joint traffic was 68 percent of the total, and in 1944 it was only 14 percent. The extremely low ratio in the war period is undoubtedly temporary. In the 5 years

immediately prior to the war Federal interchanged about 1,000,000 tons of traffic per year with the railroads, and this figure may probably be regarded as normal.

Federal's earnings have fluctuated markedly from year to year, ranging from an operating deficit of $855,906 in 1934 to operating income of $939,361 in 1938. For the 20-year period from 1925 to 1944, inclusive, in which the Inland Waterways Corporation has been in existence, its aggregate net revenue from water-line operations was $217,821, an average of $10,891 per year. Its general balance sheet for 1944 showed an earned surplus of $281,020.

Federal's traffic has principally consisted of wheat, corn, rice, flour, cotton linters, cottonseed meal and cake, coffee, sisal, bituminous coal, coke, ores and concentrates, sulphur, sugar, iron and steel (including pig iron), fertilizers, paper of various kinds, canned goods, and soap. In 1943 and 1944 it hauled a large tonnage of crude and refined petroleum. Since 1938 there has been a notable increase in Federal's tonnage of bulk commodities, which in 194' accounted for more than 75 percent of the total (chiefly sulphur, coal, petroleum, and grain).

Valley.—In the early years of Federal's history it was depicted as a temporary experiment intended to demonstrate the commercial value of river transportation. According to this view, if success were demonstrated, the Government would retire from the field, which would thenceforth be left to private capital. In 1927 a group of St. Louis capitalists considered that the experiment was successful and made overtures to the Government looking toward a possible purchase of Federal. At that time the Secretary of Commerce expressed his preference for private operation of this barge line, as did also the Secretary of War. The latter official, however, thought that it was then politically inexpedient for the Government to get out of the transportation business. Thereupon these St. Louis business men organized the Valley line, which began operation in the latter part of 1930. The initial investment in this line was $3,500,000.

[fol. 589] Originally Valley's operation was between Cincinnati, Ohio, where it invested about half a million dollars in a terminal, and New Orleans, also serving intermediate ports. In 1932 it extended its service to St. Louis. Valley in 1941 bought the entire capital stock of the Campbell Transportation Company, which for about 10 years prior

thereto had engaged in common-carrier transportation by barge principally on the Ohio River and its tributaries.[12] It leased the property of that Company in 1944 and shortly afterward included Pittsburgh, Pa., in its scheduled service under operating rights acquired from the Campbell Company.[13]

At the end of 1944 Valley owned 4 towboats of 2,000 horsepower each, which were part of its original equipment, and 79 steel cargo barges with an average carrying capacity of 345 tons. It also used 5 other towboats with an average horsepower of 1,012 each, 20 cargo barges having an average capacity of 1,100 tons each, 31 tank barges, and 35 hopper barges, leased from its subsidiary. In addition it leased or chartered from others 6 towboats, 10 cargo barges, and 51 tank barges.

Valley's scheduled service is one or two sailings each week in each direction between New Orleans and Pittsburgh with weekly connecting service between Cairo, Ill., and St. Louis.

Valley's traffic has grown each year except for temporary recessions in 1940 and 1942. Its 1944 tonnage, 1,947,226 tons, more than trebled that of any prewar year because of its heavy movement of petroleum products, which it did not carry prior to the war. Until 1942 Valley carried practically no bulk commodities, and the principal items in its traffic were rice, sugar, iron and steel articles, canned goods, paper of various kinds, soap, and glassware.

Valley has prospered financially. It has paid dividends in each year since 1936, except in 1942, the year following its acquisition of the Campbell Transportation Company. The total amount of these to January 3, 1945, was $1,324,309.

In 1939 about 45 percent of Valley's traffic was joint with railroads, the ratio being approximately the same as the corresponding figure for Federal. In the case of both carriers the ratio declined during the war, but Valley's loss of rail-water traffic was relatively less than that of Federal.

American.—This carrier, incorporated in 1927, succeeded two others which had been in operation for some time prior

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[12] *Campbell Transp. Co. Control,* 250 I. C. C. 9.

[13] *Campbell Transp. Co. Lease,* 260 I. C. C. 257.

thereto principally on the lower Mississippi and the Ohio Rivers. It owns 9 towboats with an average horsepower of approximately 1,500 each and 172 barges, having an average carrying capacity of 807 gross tons each. In 1944 it had under charter or lease 5 towboats and 49 barges. It owns terminal facilities at Glassport, Pa., near Pittsburgh, Louisville, Ky., and Memphis.

In 1944 American had 92 sailings southbound and 73 sailings northbound between Pittsburgh and New Orleans. It also operated irregularly on waterways other than the Mississippi and Ohio Rivers apparently under special contracts.

[fol. 590] Between 1933 and 1941 American enjoyed a more rapid growth in its traffic than the other two barge lines before discussed. It also has the best record of earnings. A considerable part of its traffic consists of bulk and other heavy-loading commodities, including coal, coke, sulphur, petroleum products, iron and steel articles, and scrap iron, which in 1944 constituted 60 percent of its total tonnage. It has handled relatively little rail-water traffic, the largest quantity in any single year being about 23,000 tons in 1943, 2.3 percent of the total.

The Present Structure of Joint Rates [14]

When the officials of the Railroad Administration started the Federal operation in 1918, they assumed that the rates would have to be differentially lower than the all-rail rates between the same points, if the barge service were to be attractive to shippers, but they had almost no precedents or other data to guide them in determining the amount of the differential. Taking an empirical course, they made their port-to-port rates 80 percent of the all-rail rates between the ports, this percentage having been suggested by the fact that the Kansas City Missouri River Navigation Company, which operated a barge line between Kansas City, Mo., and St. Louis from 1911 to 1918, made its rates between those points by use of this percentage.[15] At the

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[14] Barge-rail and rail-barge rates will hereinafter be referred to as two-way rates, and rail-barge-rail rates as three-way rates.

[15] See *Kansas City Missouri River Nav. Co.* v. *Chesapeake & O. Ry. Co.*, 34 I. C. C. 67.

same time it was recalled that in 1916 the rail-lake rates between New York, N. Y., and Chicago were 79 percent of the all-rail rates.[16]

To prevent political hostility to barge transportation on the part of commercial interests in the interior it was considered necessary to publish joint rates with the rail carriers to and from inland points differentially lower than the all-rail rates, and the differential selected for this purpose was 20 percent of the all-rail rate between the ports, the same as the differential reflected in the barge line's port-to-port rates.[17] This method of making joint rates set a pattern which in a general way has been followed ever since. Between June 1919 and February 29, 1920, the Railroad Administration established a limited number of two-way rates [18] but practically no three way rates.[18] [fol. 591] After Federal passed to the control of the War Department in 1920, it sought to persuade connecting railroads to broaden the joint-rate structure but was unsuccessful. Thereupon it filed its complaint in No. 13290, which covered practically the entire country and asked for joint rates wherever there was an open through all-rail route made up in part of a rail line between ports served by Federal. In its decision on this complaint the Commission stated that Federal had "attempted to lay upon us a wholly unreasonable burden," because admittedly many of the proposed routes could not justly be required. The evidence was not deemed sufficient to enable the Commission to exercise good judgment in selecting those which should be required. The Commission therefore confined its findings to a statement of general principles offered for guidance of the parties in further negotiations. Doubt was

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[16] See *Lake and Rail Class and Commodity Rates*, 205 I. C. C. 101, 179.

[17] For example, the all-rail first-class rate between St. Louis and New Orleans at that time was $1.125, and the barge rate was made 90 cents, or 22.5 cents lower. To arrive at the barge-rail first-class rate between Chicago and New Orleans, this amount was deducted from the first-class all-rail rate of $1.375, making the barge-rail rate $1.15.

[18] The two-way rates established at that time are described at 77 I. C. C. 317, 323-4.

expressed whether any further three-way rates were in the public interest. The Commission was not convinced that additional two-way rates "should be established where the degree of circuity would be excessive, nor where the barge line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation." On this point it stated:

> Until the contrary is clearly shown, however, we are of the opinion that no rail-and-barge route should be established where the short-line rail distance via the port of interchange between the interior point and the port of origin or destination exceeds by more than one-third the short-line rail distance over the most direct route, nor where the short-line rail distance between the interior point and the port of interchange exceeds two-thirds of the short-line rail distance between the interior point and the port of origin or destination. Inasmuch as this rule is arbitrary, it ought not to be too rigidly applied, in disregard of competitive or commercial conditions.

The Commission also made the following statement which has a direct bearing on the questions presented in the present proceeding:

> [The record] further indicates, however, that if such additional routes are established it will probably be necessary for the barge-line management to modify in some respects its plan of differential joint rates. So long as the barge line bears the burden of the differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount; * * * But under the proposed plan, which makes the differential in all cases 20 percent of the all-rail port-to-port rates, the results would often be incongruous and in some cases in violation of the fourth section. Moreover, insufficient thought seems to have been given to the possible disruption of established rate relationships. Doubtless some disruption is unavoidable and justifiable, but our impression is that under the barge line's plan it occurs to a greater extent than can be successfully defended, particularly in the case of export and import rates, where ports have been equalized.

[fol. 592] Although Federal was disappointed at the Commission's inability to prescribe additional routes, it acceded to the suggestion that it deal with the rail lines "in friendly conference and negotiation." In this way it was able to obtain a large number of new joint rates in the years between 1923 and 1929. The principal point at issue in those negotiations proved to be the basis of divisions.

In retrospect the negotiatory process of establishing joint rates appears to have been reasonably successful, but the more eager crusaders in behalf of water transportation in the Mississippi Valley considered it time-consuming and expensive. Accordingly in 1928 they urged upon Congress the need of some method of overcoming the reluctance of hostile railroads to establish joint rates with barge lines other than by resort to complaint and hearing under the Interstate Commerce Act. Otherwise, it was represented, private capitalists would never be willing to venture in water transportation on the rivers. In response to this appeal Congress enacted the Denison Act, which directed the Commission to issue certificates of public convenience and necessity to common carriers by water on the Mississippi and Warrior Rivers and their tributaries as a prerequisite to requiring connecting carriers to join with such water carriers in routes and rates. In the event of refusal by the connecting carriers the Commission was directed to require the establishment of through routes and joint rates and "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission." As interpreted by the Commission, the act required that this be done without hearing, since the only hearing specified therein was one upon complaint of an interested carrier "concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with water service; or (3) the reasonableness of any division of joint rates ordered by the Commission under the provisions of this Act."

Immediately after the enactment of the Denison Act Federal applied for a certificate and an order, under which it

hoped to secure a great many additional joint rates.[19] In its report, the first to be issued under that Act, the Commission observed that in Federal's application "an effort has been made to confine the proposed rates to routes not grossly circuitous as compared with the direct routes and to routes over which the transportation by barge would constitute a substantial portion of the total transportation." It pointed out that "nevertheless a number of very circuitous routes are included in the proposals as well as a number of instances where the barge haul is relatively so short, as compared with the total barge-rail or rail-barge-rail distance as to raise grave doubt whether the cost of transportation is not in fact greater over such route than over the direct all-rail route.[20] Several illustrative examples of such routes were stated. To prevent such wasteful transportation the Commission's direction to connecting rail lines to join with Federal in through routes and joint rates was subject to the exception—

> [fol. 593] that (a) no barge-rail route need be established where the short-line all-rail distance via the lines of the said rail carriers from point of origin to point of destination through the port of interchange with the barge line exceeds by more than 40 percent the shortest rail distance between such origin and destination; (b) no rail-barge-rail route need be established where the shortest all-rail distance from point of origin to point of destination through the ports of interchange with the barge line exceeds by more than 33⅓ percent the shortest all-rail distance between such origin and destination; (c) no barge-rail route need be established where the shortest all-rail distance between the inland point of origin (or destination, as the case may be) and the port of interchange exceeds three-fourths of the shortest all-rail distance between point of origin and point of destination; (d) no rail-barge-rail route need be established where the sum of the shortest all-rail distance from the point of origin to the port of interchange where the shipment is delivered to the

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[19] This proceeding will be referred to by its docket number, Ex Parte 96.

[20] 153 I. C. C. 129, 133.

barge line, plus the shortest all-rail distance from the port of interchange where the shipment is relinquished by the barge line to the point of destination exceeds two-thirds of the shortest all-rail distance between origin and destination.

Where this formula permitted the establishment of additional routes, the Commission required that the rate reflect the 20-percent differential, which Federal had originally adopted, as before stated, subject to a condition that where the circuity in comparison with the shortest all-rail route and the excess "relative service" (measured by the ratio of rail haul under the joint rate to the shortest all-rail distance) exceeded certain limits the differential should be 10 percent of the all-rail port-to-port rate instead of 20.

Compliance with the order in Ex Parte 96 necessarily had to be through collective action on the part of the railroads, and thereafter it was not feasible for Federal to negotiate voluntary rates with individual companies. With respect to rates in connection with its lines on the Warrior and lower Mississippi Federal's existing routes were less restricted with respect to circuity and relative service than they would have been under the Ex Parte 96 formula. Hence that proceeding was helpful to Federal mainly in securing joint rates via ports on the upper Mississippi and Illinois Rivers. With minor exceptions it has no voluntary two-way rates through ports north of St. Louis.

In general, the orders issued under the Denison Act on applications of Valley and American contained provisions similar to those in Ex Parte 96. The railroads voluntarily published some rates in connection with Valley between St. Louis and Cairo, on the one hand, and southwestern territory on the other hand, similar to those applicable over Federal. American had a limited number of joint rates with rail carriers before it filed its application in 1931.

Present Two-way Rates.—Generally speaking, almost every point in the United States east of the Rocky Mountains now has some two-way rates available to it, but this statement should not be understood as implying that rates are in effect between all interior points and all river ports, nor even that any given port has rates to or from all interior points. The coverage is necessarily so complicated that it cannot be described briefly.

[fol. 594] The principal barge port is New Orleans. Via other Mississippi River ports it has two-way rates to and from all of the territory between the Mississippi River and the Rocky Mountains with the exception of all but a small part of New Mexico and that part of Texas which is south of Nacogdoches and Sweetwater, to and from the region east of the Mississippi and north of the Ohio River except New England, and to and from points in southern territory west of a line connecting Louisville, Ky., and Mobile, Ala. To and from southern territory east of that line it has rates via Mobile and Port Birmingham. Via the Ohio River ports, Evanville, Ind., Louisville, Ky., Cincinnati, and Pittsburgh it has rates to and from Wisconsin and all of official territory except northern New England.

The second barge port in volume of tonnage is St. Louis (including East St. Louis, Ill. It has two-way rates to and from most of southern territory (excluding North Carolina), Louisiana, and the greater portions of Arkansas, Oklahoma, and Texas via lower Mississippi ports. Via Peoria it has rates to and from northern Illinois, northern Indiana, most of lower Michigan, and Wisconsin. To and from Iowa, eastern Nebraska, southern Minnesota, and southeastern South Dakota it has rates via Burlington and Dubuque, Iowa, and Rock Island, Ill., (referred to as the Iowa ports). To and from the remainder of South Dakota and Minnesota, North Dakota, northern Wisconsin and upper Michigan St. Louis has rates via the Twin Cities.

Cincinnati, the third barge port in volume of tonnage, has rates to and from most of southwestern territory except a narrow strip of northern Oklahoma and points in Texas "differential" territory.

The foregoing is far from being a comprehensive outline of the present rate structure but will serve to illustrate its approximate extent. So far as class rates and most commodity rates are concerned, these two-way rates are based on the 20-percent differential.

Present Three-way Rates.—Federal participates in three-way rates between points on some of the more important rail lines in Illinois, Indiana, Ohio, Iowa, and Minnesota, on the one hand, and the greater part of Arkansas, Louisiana, Texas, and Oklahoma, on the other hand, via St. Louis or Cairo as northern ports and Memphis, Vicksburg, Baton Rouge, or New Orleans as southern ports. Federal also has three-way rates between portions of Illinois, Missouri, and

Kansas on the one hand, and portions of Wisconsin, Iowa, Minnesota, and the Dakotas, on the other hand, via St. Louis and other upper Mississippi ports. It also has three-way rates between a considerable number of points in Illinois and a limited territory in Mississippi and Alabama via St. Louis or Cairo and Memphis.

Valley has three-way rates between central territory and the greater part of southwestern territory via Ohio River and lower Mississippi ports. It also has some three-way rates between the Southwest and western trunk-line territory via St. Louis and lower river ports, the extent of which is not shown in the record. There are numerous points in each territory, however, which are excluded under the Ex Parte 96 formula.

[fol. 595] There are three-way rates in connection with American between eastern territory (Pennsylvania, New Jersey, New York, and southern New England) and southwestern territory to the extent permitted by the Ex Parte 96 formula. In the case of New York City, for example, these rates apply only to and from a considerable part of Arkansas via Pittsburgh and Memphis and to and from southern Louisiana and a small part of southeastern Texas via Pittsburgh and New Orleans or Baton Rouge.

The Issues and Evidence

This litigation was precipitated by the 3 complaints filed by the railroads under the Denison Act attacking the reasonableness of rates and differentials fixed by the Commission in compliance with that act. By those complaints the railroads assumed a burden of proof specifically laid upon complainants by the Denison Act. In its inception, therefore, the general investigation in No. 26712 was ancillary in character. At the outset of the hearings, however, the two barge lines principally interested, Federal and Valley, made it clear that they would not assume a defensive position but on the contrary welcomed the opportunity afforded by the investigation to urge changes in the existing joint rates, which were unsatisfactory to them in many ways. The repeal of the Denison Act during the pendency of the litigation served to make the complaints of negligible importance. There is almost unanimous agreement among the parties that the present system of joint rates with the barge lines should be discarded and replaced by an entirely new

system. As a practical matter the Commission is in the same position in which it would be if it were undertaking to determine a proper structure of joint rail and barge rates as a novel proposition in the light of facts placed before it by interested carriers, shippers, and other parties. This circumstance makes it unnecessary to give much thought to questions relating to burden of proof.

The basic question to be decided is whether the Commission shall exercise its authority under section 15 (3) and 307 (d) of the Interstate Commerce Act—"whenever deemed by it to be necessary or desirable in the public interest"—to establish through routes and joint rates applicable to the transportation of property by common carriers by water and common carriers by railroad, "or the maxima or minima, or maxima and minima to be charged."

At the opening of the hearings the rail respondents stated that they were willing to establish joint rates with the barge lines which would be no lower than the corresponding all-rail rates, and they have adhered to that position, although in their brief they express the belief that on the facts shown of record "there is no public interest that requires a continuance of joint rates with the barge lines." The fundamental issue between the rail respondents and the barge lines is therefore centered on the following sentence in section 307(d):

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

[fol. 596] The majority of shippers who presented evidence support the 3 respondent barge lines in their contention that differentials are justified. Federal and Valley each propose new systems of joint rates as substitutes for the Ex Parte 96 formula and the 20-percent differential plan upon which that formula was based. They also seek territorial changes in the application of the rates and the establishment of many new routes with differential rates which would not be determined by any formula governing circuity and relative service.

The record—The hearings began in March 1935 and continued intermittently for a period of exactly 8 years, in the

course of which a record of 16,440 pages and about 1,500 exhibits was built up. Broad stipulations were entered into permitting the Commission to consider annual reports of the respondents. In addition, the reopening of earlier cases makes available the evidence in those records, which were made between 1921 and 1931.

During the period covered by the hearings there were far-reaching changes in commercial and transportation conditions. For that reason much of the evidence, particularly that in the earlier part of the record, is of little or no present significance.

Cost of Service—Approximately one-fourth of the record deals with cost of transportation service by rail and barge. For many years the view has been widely held and frequently expressed that water transportation, including that performed by the barge lines, is inherently cheaper, as a general proposition, than rail transportation. At the outset of the hearings the railroads announced their intention of showing "that the cost of transporting freight by barge and rail routes is not less than the cost of transporting freight by the all-rail routes, that the fact of the matter is that the all-rail routes are far more economical than the barge and rail routes." Federal and Valley accepted the challenge in this assertion and introduced evidence concerning their costs.

The railroads made two traffic studies, for which they estimated costs. One of these, referred to as the Lyrla study, pertained to 963 carloads containing a total of 24,959 tons interchanged between Federal and the Illinois Central Railroad Company in April, August, and November 1932. No other rail or water carrier was involved in this traffic. The other study, known as the Vivian study, covered 777 carloads with a total loading of 18,907 tons. It included all traffic interchanged by the railroads with Federal and Valley in selected weeks from June to October, 1933 and July to September, 1933, one week being assigned to each port. This study included three-way as well as two-way traffic. Studies relating to costs were also submitted by the Louisville and Nashville Railroad Company and the Southern Railway Company and some of its subsidiaries.

In 1932 prior to this proceeding Federal had begun an investigation of its costs embracing its traffic on the lower Mississippi from September, 1932, to February 1933. It

later extended its investigation to traffic of certain periods in 1934 and 1935 on the upper Mississippi, the Illinois Waterway, and the Warrior division. Voluminous evidence of the facts disclosed by this investigation was included in Federal's presentation.

[fol. 597] Valley's evidence included cost data for the years from 1931 through 1937 and a part of 1938. These related to operating expenses, rents and taxes. Vessel costs were developed in amounts per net ton-mile, terminal costs and absorptions in amounts per ton handled, and traffic, general, insurance, claim loss and other overhead expense in amounts per ton carried.

All of the evidence bearing on cost of service was referred for study to the cost section of the Commission's Bureau of Transport Economics and Statistics, hereinafter referred to as the Cost Section. At a further hearing a "restatement and summary of rail and barge cost data" with supporting details was introduced in evidence by members of the staff of the Cost Section. Testimony by way of comment on this restatement was received from respondents, who also filed supplemental briefs setting forth criticisms of the Cost Section's estimates. These comments and citicisms in turn have been studied by the Cost Section, which has made some modifications of its restatement, none of fundamental importance.

The Cost Section made no independent study of its own. Its restatement of the barge costs is based on the cost data by river districts and commodities introduced by Federal and the system average unit costs introduced by Valley. The restatement of rail costs is based principally on the Illinois Central system unit costs, although limited use was made of data introduced by the Louisville & Nashville and certain lines of the Southern system. Data bearing on property valuation, property used and useful in transportation service, and maintenance expenses, necessary to the Cost Section's restatement, were included in the record by testimony of employees of the Commission's Bureau of Valuation. Certain other statistics entering into the restatement were taken from railroad annual reports, and the Cost Section in its evidence submitted data showing the results of studies of rail out-of-pocket costs and a summary of various circuity studies. All cost comparisons in the Cost Section's restatement, rail and barge, are based on the year 1937. In accordance with a method suggested

by Federal both the Lyrla and the Vivian traffic tests were adjusted to make the traffic sample consistent with the composition of the barge and rail traffic in 1937.

From the final restatement by the Cost Section (i. e., adjusted for criticisms of respondents deemed valid) the following table bearing on the compensatory character of the rates in effect June 1, 1941, has been compiled:

[fol. 598]

Docket No. 26712

Comparison of Revenues from Joint Rates with Costs

	Ratio of Revenues to Costs		
	Rail portion percent	Barge portion percent	Total percent
I. Based on Operating Expenses, Rents, Taxes and Absorptions			
A. Lyrla Study Traffic			
Rail-barge and barge-rail	150	108	125
B. Vivian Study Traffic			
Rail-barge and barge-rail	131	135	133
Rail-barge-rail	120	93	109
Total	123	122	124
II. Based on Operating Expenses, Rents, Taxes, Absorptions, and a 4% return (Freight portion of railroad property value)			
A. Lyrla Study Traffic	125	101	112
B. Vivian Study Traffic			
Rail-barge and barge-rail	109	125	117
Rail-barge-rail	100	87	95
Total	105	114	109

This table indicates that for the Lyrla study traffic the rail portion of the revenues (based on divisions in effect June 1, 1941) exceeds the rail out-of-pocket costs [21] by a

[21] A rail carrier's total expenses can be separated into two categories: (1) out-of-pocket or variable, which over an extended period of time vary directly with the volume of traffic handled and hence are directly assignable to particular kinds of traffic; and (2) constant or fixed, which being in the nature of a general transportation burden resting upon the traffic as a whole must be borne by the various kinds of traffic in proportion to ability of each to make a contribution. Data introduced by the Cost Section indicate that throughout a long period the out-of-pocket expenses of railroads as a whole include from 70 to 80 percent of operating expenses, rents and taxes. Furthermore over a long period approximately 100 percent of the investment

[fol. 599] percentage somewhere between 25 and 50, if it be assumed that the out-of-pocket cost lies somewhere between the two bases. The margin for the barge line would be less, between one and 8 percent. For the combined service the indicated excess of revenue above cost is between 12 and 25 percent.

The showing is not so favorable for the Vivian study traffic. Here the indicated rail revenue exceeds the rail out-of-pocket costs by a percentage between 5 and 23. The margin is greater on the two-way traffic than on the three-way, 9 to 31 percent for the former and 0 to 20 percent for the latter. The foregoing table indicates that the divisions of the three-way rates may be less favorable to the barge lines than to the rail lines but this is offset by the showing as to the two-way traffic. On the whole the figures based on the Vivian study indicate that the barge lines are not unfairly treated in the division of revenues.

The major controversy engendered by the cost evidence relates to the question whether traffic can be moved more cheaply over rail-and-barge routes or over all-rail routes. The Cost Section's restatement produces figures indicating that the latter have the advantage. In that restatement costs were computed on 2 bases: (1) Operating expenses, rents, taxes, and absorptions with no allowance for return on investment; (2) the same items plus allowance for 4 percent return on investment, which in the case of railroads was limited to property used in freight transportation. On the first basis the estimated cost of moving the Lyrla study traffic over rail-and-barge routes is $143,741 and over all-

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in equipment and between 50 and 70 percent of the investment in road property is variable with traffic volume. No corresponding study for barge transportation is available, but the evidence here tends to show that the volume of barge service rendered, as in the case of rail service is responsive over a long period to the tonnage carried. It can reasonably be assumed that the out-of-pocket costs for barge operation over an extended period of time constitute at least as high a percentage of the fully distributed costs as the corresponding rail percentage, and indeed the barge percentage may be higher since the items of rail expense least responsive to changes in volume of traffic, maintenance of way and investment in road property, are either nonexistent in barge transportation or of little significance.

rail routes, $117,869, the ratio of the former figure to the latter being 122 percent. On the second basis the corresponding figures are $161,449, and $141,879, respectively, and the ratio, 114 percent. The estimated cost of handling the Vivian study [22] traffic under the first basis of costs is $115,858 over rail-and-barge routes and $98,426 over all-rail routes, the ratio of the former figure to the latter being 118 percent. Since the Vivian study included both three-way and two-way traffic, as before stated, the restatement affords a comparison of costs for these two categories. On the first basis of costs the estimate for the two-way traffic is $67,438 as the total cost of movement over rail-and-barge routes compared with $60,794 over all-rail routes, the ratio being 111 percent; under the second basis the cost for joint transportation is $132,446 and $118,476 for all-rail, a difference of 12 percent. For the three-way traffic, on the other [fol. 600] hand, the estimated costs under the first basis are $48,420 for rail-and-barge movement and $37,632 for all-rail movement. Under the second basis of costs the estimated cost for rail-and-barge movement of two-way traffic is $76,593 and $73,178 for all-rail, a ratio of 105 percent. For the three-way traffic on the second basis the corresponding figures are $55,853 and $45,298 with a ratio of 123 percent.

The foregoing cost comparisons show aggregate costs only. To show the effect of variations in length of haul by water as well as by rail, the Cost Section prepared figures

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[22] As previously explained, Illinois Central system costs were used in computing costs for both the Lyrla and Vivian study traffic. The only significant differences in the unit costs used for rail hauls in the two studies were as follows: The expense for rail-to-rail interchange was not used in the Lyrla study, which involved only the Illinois Central. A ratio of 27 percent as used in the Lyrla study as the ratio of empty-to-loaded box-car miles, but the corresponding ratio in the Vivian study was 33 percent. The rail portion of the joint hauls in the Lyrla study had an average circuity of 17 percent, compared with 13 percent in the Vivian study. In the Lyrla study the average circuity of all-rail routes was 7 percent, compared with 13 percent in the Vivian study. These differences arise from the fact that the Vivian study involved traffic over more than one railroad, while the Illinois Central was the only rail carrier which participated in the traffic covered by the Lyrla study.

for a large number of selected movements between ports on the lower Mississippi, the Illinois, the Ohio, and the Warrior rivers and inland points at distances ranging up to 500 miles from river ports. Costs were first computed for joint two-way movement and compared with like computations for assumed all-rail movement via the ports as well as over direct all-rail routes. For the latter an average circuity of 13 percent was assumed. In this comparison costs for a variety of individual commodities were estimated, but in the examples set forth below only the figures for products of manufactures and miscellaneous freight are shown. The costs used are on the second basis before referred to, i. e., including a 4 percent return on investment. The cost for the water movement includes in addition to line-haul expense and terminal absorptions the expense for handling traffic between dock and barge at one terminal and of handling between barge and car at the port of interchange. The rail costs include the line-haul expense and terminal handling at points of origin and destination. The examples are as follow:

[fol. 601]

Docket No. 26712

Percentage Ratios of Costs[1] of Representative Barge-and-Rail Movements Costs of All-Rail Movements between the Same Points

Barge Haul	Port to Port [2]	Distance of Inland Point of Origin or Destination from Port of Interchange		
		100 miles	300 miles	500 miles
New Orleans–Baton Rouge (132)[3]	157	194	146	124
New Orleans–Memphis (645)	98	117	121	118
New Orleans–Cairo (870)	85	105	104	107
New Orleans–East St. Louis (1030)	78	93	94	99
Memphis–Vicksburg (323)	118	150	137	123
Memphis–Cairo (225)	127	164	140	123
Memphis–East St. Louis (405)	101	127	126	118
East St. Louis–Peoria (201)	135	170	145	127
New Orleans–Mobile[4] (160)	130	163	133	117
New Orleans–Port Birmingham[4] (579)	108	129	122	119
New Orleans–Cincinnati (1,384)	113 [5]	109 [5]	106 [5]	111 [5]
	100 [4]	103 [4]	100 [4]	106 [4]

[1] Unless otherwise stated barge costs are those of the Federal Barge Lines and rail costs are those of the Illinois Central system.

[2] This column shows ratios of costs for barge transportation to those of all-rail transportation between the ports.

[3] Figures in parentheses show distances in water miles between the ports.

[4] Rail costs are those of the Louisville and Nashville R. R. Co.

[5] Barge costs are derived from data for the Mississippi Valley Barge Line Co. and rail costs are those of the Southern Railway system lines.

The foregoing comparisons reflect only general trends rather than precise cost ascertainments. They bear out the view generally held that such economy as there may be in barge transportation varies directly in proportion to length of haul. This is due to the relatively high terminal costs on water traffic. For example, from 80 to 93 percent of the cost of water transportation between New Orleans and Baton Rouge is terminal expense. Even for a longer haul, such as that between New Orleans and East St. Louis terminal costs commonly represent from 34 to 60 percent of the total cost. In the case of all-rail hauls terminal costs are between 20 and 25 percent of the total expense for a haul of average length.

[fol. 602] The barge lines and the railroads are in sharp disagreement as to the value of the cost evidence. The former make a number of criticisms of the Cost Section's restatements in arguing that costs should not be a controlling element in the Commission's decisions. These will be briefly restated: The traffic tests, having been made more than 10 years ago, do not reflect present conditions. The barge costs are based on Federal's operations, which have had a pioneering purpose, and should not be accepted as a pattern for other barge lines. The cost studies are old. Rail costs are largely limited to those shown by Illinois Central data and ratios of empty-to-loaded box-car mileage.

In answer to these criticisms it may be said that the traffic tests were adjusted at the insistence of Federal to reflect substantially the make-up of the interchanged traffic in 1937. Federal's costs were likewise adjusted to reflect improvements in operating practices and economies that were effected between 1933 and 1937. Federal and Valley being the barge lines which have the greatest volume of traffic, it was proper to use their costs for this purpose, and the evidence indicates that Federal's costs do not compare unfavorably with those of Valley. (It will be pointed out *infra* that Federal's showing is even the more favorable in some respects.) Valley's costs are shown for a succession of years, but only the figures for 1937 were used by the Cost Section. Federal's over-all costs per ton-mile increased approximately 15 percent between 1937 and 1939, while the increase in such costs shown for Valley in the same period was but one percent. Rail cost studies, based principally on Illinois Central data, were adjusted to reflect conditions in 1937. The Illinois Central's costs for that year closely

approximated those shown for it in 1939. Its costs per net ton-mile were found to vary little from those of other rail carriers which also compete directly with the barge lines.

Although the implications from the cost evidence may be regarded as more favorable to the rail carriers than to the barge lines, the former criticize the Cost Section's restatement on the ground that rail costs have been overestimated. The railroads urge that return on investment should be excluded, as well as allowance for passenger-service deficiency. The principal point at issue between them and the Cost Section, however, involves an adjustment made by the section on the ground that the expenditures of the Illinois Central for maintenance of way and equipment in 1937 were below a normal level. Evidence on this point was introduced by that carrier as well as by the Cost Section, but this will not be discussed here since no finding on this issue is deemed essential.

Another contention of the railroads is that the so-called "hidden costs," namely the cost to the Government of constructing and maintaining the inland waterways, should be added to barge-line operating costs in estimating the expense of barge-rail transportation. Such an addition would of course make the comparison to be drawn from the Cost Section's restatement still more favorable to the railroads. It has been shown *supra* that the estimated cost of transporting the Lyrla study traffic over rail-barge routes, including 4 percent return on investment was $161,449. To allow for Government expenditures on waterways, as estimated by the Cost Section, it would be necessary to add to this figure $41,279, making a total of $202,728, 42 percent in excess of the estimated costs for all-rail movement. Similarly for the Vivian study traffic the cost for joint barge and rail [fol. 603] movement, including a 4 percent return, allowance for Government expenditures would produce a total cost of $169,097, 43 percent greater than the cost for all-rail movement.

The Government expenditures have had the effect of facilitating navigation and thus reducing operating costs of the barge lines, as well as relieving them of the expense of constructing and maintaining a physical plant comparable to a line-haul railroad track. In addition to this form of public aid the barge lines have a relatively light burden of property taxation, as the railroads point out. In 1944 Valley and American paid taxes other than those levied

by the United States Government amounting to $43,301, which was 0.36 percent of their combined operating revenue.[23] The corresponding ratio for the class I railroads in 1944 was 3 percent.

Whether such advantages as these amount to favoritism which is unfair to the railroads, as they contend, is not pertinent to this investigation. The question involved is one of general Government policy, as the railroads concede. They argue, however, that, having the advantage of free waterways, the barge lines should not be given the further advantage of differential joint rates. The public aids to water transportation, however, have generally been regarded as an argument in favor of differential rates rather than otherwise. As shown subsequently in this report, that view was expressed by Congress when it enacted the Denison Act.

The shippers' interest in barge transportation—In the past one of the principal arguments advanced in favor of the development of barge transportation has been based on the fear of many people that the railroads in this country had reached the limit of their ability to supply the trans-

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[23] In Federal's annual report to the Secretary of Commerce each year it states:

> The Inland Waterways Corporation is exempt from taxation, however, if privately owned, it would be required to pay taxes on its investment in terminal property and equipment. Information received from reliable sources indicates that privately owned carriers operating on inland waterways of the United States are not subject to taxes on their floating equipment. Approximately 86% of the Corporation's total investment in water line facilities consists of floating equipment.

It appears that Valley and American are among the carriers which are not subject to taxes on their floating equipment since they are incorporated in the State of Delaware, which has not seen fit to avail itself of the principle approved in *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63. There are indications that some of the States bordering on the rivers on which Valley and American operate are trying to subject them to new forms of State taxation.

portation required by an expanding economy, particularly the abnormal demands in time of war. This was the argument principally relied on in 1917 when it was represented that barge service was necessary to enable the Government to meet the transportation needs of World War I. As the service was begun too late to be of any material use in that [fol. 604] war, the argument was not disproved by that brief experiment and was renewed in this proceeding. One of Federal's witnesses testified in discussing the apparent deterioration in the railroad plant which was causing concern in many quarters 7 or 8 years ago:

> These facts demonstrate that, in the year 1937, notwithstanding the improvements in efficiency of rail transportation, the carriers had just about reached the limit of their capacity and the volume handled by the railroads in 1937 represents about the maximum volume they can satisfactorily handle with serviceable equipment of that year.

In 1944, however, with fewer locomotives and about one percent more freight cars the railroads performed twice as much freight transportation (measured by revenue ton-miles) as they did in 1937, and the increase by the roads in the southern region was 123 percent. The total number of tons carried by rail in that region in 1944 was 413,284,760, an increase of 193,709,932 tons over the number transported in 1937, a gain of 88 percent. The 3 barge-line respondents likewise have a creditable record of war-time transportation performance, having carried about 2,500,000 more tons 1944 than in 1937, an increase of 80 percent, because they were able to transport considerable quantities of petroleum and other bulk commodities, which some of them did not carry before the war. On the other hand, some commodities which formerly had been important items of rail-and-barge traffic appear to have returned largely to all-rail routes during the war. As things turned out, the railroads were in less need of assistance from the barge lines in carrying their war-time traffic than had been expected.

The interest in water transportation among shippers in the Mississippi Valley actually is attributable not so much to a need for additional transportation facilities as it is to the desire for lower transportation charges. To a great extent the revival of river transportation is an indirect re-

sult of the enactment of the Interstate Commerce Act, particularly the long-and-short-haul provision. The amendment of section 4 in 1910 was a portent to the more important river cities that they were eventually to lose their depressed rail rates based on potential steamboat competition. Certain decisions of the Commission about 1917 [24] confirmed their fears that a "dry-land" basis of rates was impending, and in that year a project for a barge line was launched by business men of New Orleans, St. Louis, and Memphis. It is clear that the purpose behind this proposed line was to secure lower rates either by rail or by water. As war conditions in 1917 made it impossible for the promoters to obtain the necessary capital and equipment, the Government was induced to take over the project on the theory that it was necessary to expand war-time transportation facilities. Ten years later under similar circumstances barge transportation was extended to the upper Mississippi; at that time it was the Twin Cities which were being elevated to "dry land." [25]

[fol. 605] At about the time when potential water competition was beginning to wane as a rate-making force, the Mississippi Valley Association was organized. The object of this Association, which describes itself as "a non-profit corporation with membership consisting of shippers and citizens in twenty-two States in the Mississippi Valley," is "to promote the economic welfare of the Mississippi Valley States and of the nation by developing the economic resources and promoting the commerce of the Mississippi Valley." The Association states that it "has no interest in carriers, other than as users of transportation, and is not concerned with fostering one form of transportation as against another, but is interested in developing all forms of transportation to their maximum public use and benefit." Its most conspicuous activities thus far, however, have had to do with the development of water transportation. Among other achievements it claims credit for authorship of the Denison Act.

The Mississippi Valley Association considers that there is an undesirable congestion of population in the States

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[24] *Rates from New Orleans and Galveston*, 44 I. C. C. 727.

[25] *Inland Waterways Corp.* v. *Chicago G. W. R. R. Co.*, 129 I. C. C. 521, 523.

bordering on the "rockbound Atlantic Coast" and that there is a vital need "to bring about a more even diffusion through the interior." This congestion of population it attributes to a high degree of concentration of manufacturing industries "along the deep-water rim of the United States" where they have the benefit of low-priced water transportation as well as rail transportation. According to the Association the failure of the Mississippi Valley to progress normally in population and industry is due to high transportation costs, which have retarded the growth of manufacturing. It says:

> This handicap can be removed in large degree through the development and use of inland water transportation. The extent to which these benefits can be spread throughout the interior will depend upon the extent to which favorable joint rates and service are established and maintained.

A considerable number of commercial witnesses were presented by the Association. They included traffic officials of manufacturing concerns, officers of agricultural organizations and chambers of commerce, representatives of State commissions and others. These witnesses testified early in the hearings and described conditions as they were in 1937 and prior years.

At that time there was a growing southbound barge movement of manufactured steel products, agricultural implements, tractors, automobile and truck parts, canned goods, beer and other alcoholic beverages, and other miscellaneous commodities from the middle West to the South for consumption in that territory, for export, or for transshipment to the Pacific coast. The southbound barge movement of agricultural products consisted chiefly of wheat, corn, and tobacco. The volume of these, which averaged about 15 percent of the total, and fluctuated from year to year reflecting changes in the export demand for agricultural commodities.

The northbound barge movement on the Mississippi in that period greatly exceeded the southbound, and generally this has always been true causing an unbalance in traffic [fol. 606] which has been disadvantageous to the barge

lines.[26] In 1937 and prior years the preponderance of northbound tonnage was sugar, but there was also a considerable movement of sulphur, crushed oyster shells, sisal, cotton linters, cottonseed meal and cake, coffee, rice, bags and bagging, pig iron, and canned goods. These commodities comprised about 45 percent of the total tonnage of both Federal and Valley in 1937.

The record supports a conclusion that most of the barge movement above referred to was due to the fact that the rates were lower than they would have been for all-rail shipments. Much evidence was presented by shippers to show that from the standpoint of service barge transportation is inferior to all-rail. The principal disadvantage is the longer time involved. Federal's schedule between New Orleans and St. Louis is 15 days northbound and 7 days southbound, contrasted with 2 days for rail shipments. The hazards of navigation often increase the transit time of barge shipments. Consequently when speed is essential shippers must use rail transportation, as, for example, when it is imperative that a shipment of export freight must arrive at a port before a certain sailing date of an ocean vessel. Transfer of shipments from barge to railroad car or *vice versa* increases freight damage. Fragile objects, such as chinaware and some kinds of furniture, are for that reason not well adapted to barge transportation. In the shipment of agricultural implements, which have moved in some volume by barge, the handling between barge and car has caused marring of painted surfaces and disarrangement of packages, which make barge transportation less desirable for this traffic. In the case of such commodities as corn, rice, and coffee barge transportation to some extent is conducive of deterioration or shrinkage on account of the slow transit, infestation, or contamination through contact with other freight. Bulk freight must be handled in large minimum quantities, and shippers of grain find barge transportation less desirable on this account. Another objection

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[26] In 1938 Federal had an unusually heavy movement of export grain which made its southbound tonnage larger than its northbound. There was almost an equality of directional movement in 1939, but since that time its northbound movement has been predominant. Valley seems to have had a more nearly balanced traffic than Federal.

to barge transportation arises from the fact that the rates therefor are not generally subject to storage-in-transit arrangements applicable in connection with all-rail rates.

Admittedly the slowness of movement is sometimes unobjectionable or even desirable to a shipper, when the freight is to be stored after its arrival, for he is saved storage costs while the shipment is in transit. Under certain marketing conditions the value of barge transportation to shippers of coffee, cotton linters, and sugar may be enhanced on this account.

On the whole there is no reason to disbelieve the testimony of numerous witnesses for shippers who stated that their only object in shipping by barge was to save transportation costs. This testimony is borne out by loss of many kinds of traffic which the barge lines suffered during the war, when speed of movement became a more important factor [fol. 607] than saving in freight charges.

One of the favorite arguments for the development of water transportation in the Mississippi Valley has long been based on the availability of coastwise and intercoastal steamship service to manufacturers and other shippers doing business on or near the seacoasts. The record here is a fairly substantial foundation for this argument. At the time when the testimony was taken the manufacturers in the middle West were in competition with others in the East who had the advantage of acutely competitive ocean rates to the Gulf and Pacific Coasts, and many western manufacturers undoubtedly would have had greater difficulty in withstanding the eastern competition without the aid of the barge lines. For example, ocean rates on canned goods from Baltimore, Md., to Houston, Texas, in 1935 are said to have ranged from 20 cents [27] to 32 cents. Addition of a rail rate of 27 cents from Houston to Dallas, Texas, made through ocean-rail rates from Baltimore to Dallas somewhere between 47 and 59 cents. From Indianapolis, Ind., a representative point of origin for canned goods in central territory, the all-rail rate to Dallas at that time was 73 cents, and the rail-barge-rail rate, 63 cents. Another typical example in the record relates to a manufacturer of paper tablets at Memphis in competition with another at Newark, N. J., both of whom had a market for their products on

[27] Rates are stated in cents per 100 pounds.

the Pacific coast. The applicable railroad rates were 95 cents from Memphis and $1.30 from Newark. The shipments from Newark, however, moved by ocean at a rate of 70 cents, and the Memphis manufacturer would have been unable to compete if a barge ocean-rate of 76 cents from Memphis to San Francisco, Calif., had not been established.

The ocean competition in the '30s was keenly felt by the barge lines, particularly by Valley, for the low ocean rates were responsible for a considerable movement of freight from central territory to the South and Southwest by rail to eastern ports and steamships beyond. This influence was felt as far inland as Indiana, causing a series of what are described as "rate wars" between Valley and the ocean lines, which were curbed to some extent by the enactment of part III of the Interstate Commerce Act requiring publication of the water rates.

The uncertainties which at present obscure the future of intercoastal and coastwise water transportation make it difficult to appraise the weight to be given to the evidence concerning the effect of this transportation on inland shippers. There is reason to believe, however, that a return to peacetime commercial conditions in the next few years will be marked by some intensification of carrier and commercial competition, although it may differ in certain respects from that of 10 years ago described in this record. In any event it seems likely that the shippers in the Mississippi Valley will continue to regard the barge lines as having little or no value to them except as competing carriers whose effectiveness depends on their maintaining lower rates than those which the railroads are able or willing to establish. Most of the shipper witnesses freely conceded a public need for efficient railroad service but refused to sympathize with the expressed fears of the railroads that their ability to supply such service might be impaired by the substitution of barge-rail for all-rail transportation. One such witness voiced the prevailing shipper sentiment in the following words: "I depend on the railroads taking care of themselves."

[fol. 608] It was suggested by some of the railroad witnesses that the barge lines might properly and profitably confine their service to transportation on local rates between their ports. The barge lines countered these suggestions by hints that, if they were so restricted, they might be forced to resort to more vigorous competitive measures,

including establishment of joint rates with motor carriers, in order to obtain a sufficient volume of traffic. Some of the newer river carriers are apparently able to get along well on port-to-port traffic, as American has done for 20 years. The declining trend in the joint traffic of Federal and Valley previously mentioned may indicate that these carriers are less dependent on joint rates than they were thought to be at one time, but there seems to be more reason to believe that under normal conditions port-to-port traffic would not furnish a profitable volume of traffic for scheduled common-carrier barge operation such as that provided by Federal and Valley. In 1940 70 percent of Federal's traffic between New Orleans and St. Louis was joint.[28] From the attitude

[28] So far as the record shows, the barge lines have not been interested in establishing joint rates with motor carriers. At one time Valley had some joint barge-motor rates on sugar, which seem to have been reasonably satisfactory.

manifested by many shippers in this proceeding it appears that they would consider themselves unduly prejudiced if reduced rates for barge transportation were available only to their competitors in the port cities. In the opinion of these shippers joint barge-rail rates afford the best means of extending the benefits of water transportation to interior points.

The Justification for Differentials

Congressional policy—There can be no question that the commercial interests of the Mississippi Valley have exercised a potent influence on congressional legislative policy with respect to water transportation. The outstanding example of this influence was the enactment of the Denison Act, and the following statement in the report of the House committee on interstate and foreign commerce on that measure is illuminating:

> The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purpose for creating the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.

> Paragraph (e) of the bill was carefully prepared to accomplish this purpose. If enacted into law, it is believed by the committee that it will immediately result in overcoming the reluctance of many of the railroads to cooperate with the Inland Waterways Corporation, and will aid in bringing about such through routes, joint rates, and fair division of joint rates as will afford to the people of a large part of the country the economies of cheaper transportation by water.

From the foregoing it appears that in the view of the committee "the economies of cheaper transportation by water" were linked with the Government's outlay for river [fol. 609] improvement and justified the establishment of joint rates between railroads and barge lines lower than all-rail rates to compensate in some degree for the public expenditures.

The repeal of the Denison Act in 1940 can not be interpreted as marking a change in legislative policy with respect to joint rates between railroads and barge lines. The proponents of that act seem to have realized that it was of little value after the decision of the Supreme Court in *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, but no move was made to repeal it until about 6 years later. Even in the bill known as S. 2009, which became the Transportation Act of 1940, as passed by the Senate in 1939, it was expressly provided that powers vested in the Commission by the Denison Act were not altered or diminished. The section of the bill which dealt with the Commission's authority to establish through routes and joint rates specifically included "in the case of a through route where one of the carriers is a water line, the minimum differential which should apply in connection with such route." In the substitute bill passed by the House of Representatives it was proposed to repeal the Denison Act. That bill included a section on which section 307(d) of the Interstate Commerce Act is based, authorizing the Commission to establish through routes and joint rates applicable to transportation by water carriers and railroads. It contained the following sentence:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission *may* prescribe such reasonable differentials, if any, as it may find to be justified between all-rail rates and the

joint rates in connection with such common carrier by water [Emphasis supplied]

The committee of conference substituted "shall" for "may", and the sentence as so modified is now in section 307(d). The committee also adopted the House proposal that the Denison Act be repealed, influenced perhaps by the following recommendation of the Commission's legislative committee:[29]

> The act should be included among those to be repealed. An analysis of it, in connection with the decision of the Supreme Court in *United States* v. *Illinois Central R. Co.*, 291 U. C. 457, will show that it accomplishes nothing which cannot be accomplished as effectively under the provisions of the Senate bill.

The existing statute, therefore, lays a mandatory duty on the Commission to establish joint water-rail rates lower than corresponding all-rail rates when it finds such differences "to be justified." The nature of the showing upon which justification may be found presents an administrative question.

In past decisions of the Commission relating to barge [fol. 610] rates there are many statements which support the contention of the railroads that "there can be no justification under any circumstances for requiring the railroads to establish differential rates with the barge lines in the absence of the clearest and most convincing proof that the relative cost of transportation by the differential routes is substantially less than the cost by the all-rail routes." For example in *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126, 144, the Commission said:

> The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost. Here the evidence in regard to cost of service is meager • • •

[29] Omnibus Transportation Legislation, House Committee Print (76th Congress 3d Session) p. 75.

Division Five expressed a somewhat similar idea in *Inland Waterways Corp.* v. *Aberdeen & R. R. Co.*, 183 I.C.C. 761, 765:

> The railroads of the country, considered as in effect parts of one great system of transportation, are in direct competition for traffic with water lines including the Federal barge line. As such competitors, it appears to us that it would be unfair to force them to divert from their rails traffic originated by them to competitive water lines, except in those instances where it can be shown that the services to be performed can be more economically rendered by the water lines than by the rail lines, or where there is some other justification other than a mere desire upon the part of the water lines to divert traffic from the rails for the sole purpose of increasing their tonnage and securing the revenue accruing therefrom.

Such statements as these, of which many other examples could be cited, show the influence of views usually expressed before the Commission by Federal. In one of the earlier reports of the Commission, namely that in No. 19017 (reopened for further hearing with this proceeding, 129 I.C.C. 521, 525), is the following:

> The barge line asserts that the proposed rail-barge rates made differentially lower than the corresponding all-rail rates are justified by the fact that water transportation is generally less costly than rail transportation and also less desirable to the shipper. * * * The principal witness for the barge line stated that the experience of eight years' operation "leads to the conclusion that well-equipped common carriers on such streams as the lower Mississippi River can be profitably operated at one-half the average cost of rail service in the United States," but gives no data to support this opinion.

The additional experience of some ten years did not inspire any similar statements by Federal's witnesses in this record. The most recent statement of Federal's view on the subject is in a report on a proceeding submitted less than two years

ago, *Inland Waterways Corp.* v. *Southern Ry. Co.*, 263 I.C.C. 227, 234:

> [fol. 611] Complainant insists (1) that the prime reason for differential rates is not the disability of the service by water but the lesser cost of operation by water than by rail, and since the relation of the line-haul rates is not in issue herein it must be presumed that the differentials in the barge-rail rates reflect the lesser cost of the barge-rail service;

It is far from easy to reconcile these statements with what Federal says here in its latest brief:

> The *basic proposition on which we stand* is that it is impossible and impracticable to make any direct cost-to-cost comparisons *which would be useful in this case.* * * * the only rate question for decision in this case is whether Sections 1 and 3(4) of the Act are satisfied by the relation of the existing rates maintained over the joint routes to the existing rates on the same traffic maintained over corresponding all-rail routes and, if not, what changes in the differential rates are required to provide lawful rates and rate relations.

Apparently Federal now considers the principal, if not the sole issue in the case to be what it calls the "section 3(4) issue" not previously referred to as such prior to the filing of its brief on further hearing. Its argument on this issue is to the effect that under section 3(4), which provides that railroad carriers "shall not discriminate in their rates, fares, and charges between connecting lines," no rail line can refuse to participate in joint differential rates with barge lines "so long as its division equals those which it is willing to, and does, accept when participating in a corresponding all-rail route." The argument is based in part on a passage in one of the Commission's reports in No. 13290, 92 I.C.C. 528, 546-7, in which it expressed some doubt as to its power to prescribe differentials but concluded that it could do so under this provision of section 3—"provided the differential fairly reflects the lower cost and value of the barge line's service." Federal agrees with the Commission's conclusion minus the proviso. In view of the enactment of section 307(d) it is no longer necessary to look to

section 3(4) for the requisite authority to prescribe differentials.

The order of investigation in this proceeding stated that it was instituted "with the view to making such findings in the premises and prescribing such just, reasonable, and otherwise lawful joint rates, rules, regulations, and practices and such reasonable minimum differentials, if any, as the facts and circumstances shall appear to require." The order made no mention of section 3, and it is impossible to regard the proceeding as one primarily involving discrimination between carriers. It is not altogether clear what factors Federal would consider controlling if findings of discrimination are not made, but manifestly it is not here relying on any contention that its operating costs are lower than those of the railroads.

Valley shows some reluctance to disregard venerable traditions concerning the lower operating costs of barge lines. It concedes that barge differentials "have never rested upon a foundation of mathematical precision or cost ascertainment" but says that they "have been accepted as [fol. 612] reasonable by experience just as they have always been deemed justified by the accepted thought, amounting to conviction, that the cost of transportation partly by water, within certain limits on circuity and relative service, is cheaper than the cost of transportation all-rail." It warns of "probable social or political repercussions" as a result of permitting "a cost formula which fairly reeks with assumptions and flies right into the teeth of actualities" to outweigh this "accepted thought, amounting to conviction." If differentials can be justified only on the ground of lower operating costs, the Commission could hardly rely on a general impression of this kind as a substitute for evidence.

American argues that cost evidence should not be given controlling weight in this proceeding but is also of the opinion that any conclusion from the cost studies previously discussed favorable to the railroads' contentions is disproved by simple statistics concerning its own operations. It points out that in 1941 its average cost was "less than two mills per ton-mile which is only a fraction of the corresponding cost of common carrier railroad transportation. . . ." This average is its average cost per ton of $2.3878 in 1941, divided by 1,300, its average haul in miles. The latter figure is somewhat larger than the water

distance from Pittsburgh to Memphis (1,206 miles), between which the short-line rail distance is 786 miles. Even if American's average haul be considered equivalent to 800 rail miles, the latter figure is not comparable with the average rail haul of all railroads as a single system, which was 368 miles in 1941. Under these circumstances a comparison of average ton-mile costs is without significance for reasons explained in *Cotton and Cotton Linters from South and Southwest*, 183 I.C.C. 33, 43-44.

At the opening hearing the Mississippi Valley Association stated its position to be that barge and rail joint rates "are justified by the lower cost and the lower value of the service via the joint rail and water route as compared with the all-rail route," and that the joint service over such routes "should be at such rates as are justified by the savings in the cost of transportation via the water routes, under the cost of all-rail transportation." In its brief, however, it minimizes the importance of lower value, saying:

> But we submit that the "value of the service" should have very little consideration in determining the proper measure of differentials. From the public standpoint, barge transportation has only one value, its low cost, and the lower the cost, the greater the value. The whole purpose of inland waterway transportation would be defeated if differentials were based on the relative value of the service. Low-cost transportation is the function of the waterways and the cost saving should be the measure of the differentials. It is agreed by all the parties that it would be impossible to fix differentials which would evenly divide the traffic and "leave the shipper in doubt as to which form of transportation to use."

One of the few points of agreement between the Association and the railroads is their common fear that the Commission may undertake to "divide the traffic" by giving improper weight to value of service. On this point the railroads say that the Commission does not have "the [fol. 613] power to require railroads to establish joint rates with their competitors that will insure a diversion of traffic from the railroads to such competitors" on the ground that the service of the competitors is inferior.

The fears of both the Association and the railroads seem to be directed to a possible abuse of administrative discre-

tion. In prescribing just and reasonable rates the Commission is required to give due consideration "to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed" [value of service] as well as "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide" adequate and efficient transportation service [cost of service]. The weight to be given to these elements of course depends on the facts disclosed in any particular proceeding. . .

The wording of section 307(d), which governs the Commission in this proceeding, is similar to that of many other provisions of the Interstate Commerce Act under which the Commission has a wide range of administrative judgment. There is nothing in that wording nor in the legislative history of the section to support a view that differentials can be found justified only upon a showing of a lower cost of operation by water. Congress may be presumed to have been aware that, while the Commission in its barge-line decisions had mentioned the reputed economy of water transportation, it had not been over-critical of such evidence thereof as had been offered in those cases.

The argument of the railroads based on costs derives a certain dramatic force from the fact that in the past the barge lines and their supporters have strongly asserted their ability to perform transportation at costs lower than those of the railroads without support of ascertainable facts. On the other hand, the history of the barge rates shows clearly that they have always rested mainly on a comparison of value rather than of cost of service.

Perhaps the most important principle which the Commission has laid down in barge-rail rate cases is the one previously quoted from its first report on this subject 77 I.C.C. 317, 362, that "so long as the barge line bears the burden of the differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount." This of course does not make the barge line the arbiter nor exclude consideration of other factors, such as circuity and situations where the barge line's part of the joint haul would be so small that its equitable division would be insufficient to cover its costs, as well as rate relations and numerous other circumstances which might be disclosed by the evidence in the individual case.

When the barge line "bears the burden of the differential," it receives a smaller amount of revenue for its share of the joint service than a competing rail carrier obtains for rail transportation. As a component of the competitive system of transportation which prevails in this country it may legitimately do this if it feels compelled to accept such a burden because of the inferior value of its service. Presumably it would not ordinarily do so without determining whether its reduced division would cover its operating costs. If it performed service at less than cost, it would be guilty [fol. 614] of an unfair and destructive competitive practice which might call for the exercise of the Commission's restraining powers. Federal declares that such joint rates as may be prescribed in this proceeding "must provide a return on the investment in the facilities by which the services are rendered." The cost above mentioned therefore may be understood as fully allocated and not out-of-pocket expense. Valley apparently agrees with this statement in principle but not all of its proposed differentials appear to be consistent therewith.

Railroad class rates, it is believed, are on a sufficiently high level in most instances to justify differentials for barge-rail rates on the theory above stated. This may not be true as to all railroad commodity rates, but for reasons stated subsequently no differentials for these are recommended in this report. The question whether the railroads can or should be required to maintain rates sufficiently high to allow differentials for barge-rail rates touched on in the railroads' brief, can not be answered in this proceeding. The answer seems to depend on the role to be assigned to competition in rate making of the future.

[fol. 615] The Joint Rate Structure to be Prescribed

In the quarter-century since the revival of river transportation controversy over the joint-rate structure has tended to obscure the fact that on the whole—at least so far as class rates are concerned—it is a fairly satisfactory product of an evolutionary process. Federal concedes this in the following quotation from its brief:

> While some of the individual rates making up the whole of the rate structure may require revision in the interest of consistency and relative reasonableness, we have demonstrated * * * that the existing differ-

ential as a whole is reasonable and is in the public interest.

The following quotation summarizes Federal's criticisms of the present rates:

> In the first place, some of the rates provided in the old voluntary adjustments are probably uneconomical, due to an excessive degree of circuity. Furthermore many of the rates provided by the Ex Parte 96 formula are wholly unsatisfactory because of the inconsistencies and maladjustments which result from the application of that formula.

Some of the general principles which in the past have been applied more or less rigidly in the determination of joint rates are no longer useful. The 20-percent differential originally reflected fairly well the inferior value of barge transportation but various elements have rendered it obsolescent for the past 10 or 15 years. On the other hand, the experimentation with the 10-percent differential did not prove successful. It no longer appears desirable to relate the differential to the port-to-port rate.

It follows accordingly that the Ex Parte 96 formula must be discarded. When that formula was devised, Federal only was in operation; as applied to the Ohio River lines the formula produced some indefensible port relations and other inconsistencies. The circuity and relative-service restrictions in the formula rested on sound principles, but they were applied with an inflexibility which the Commission did not intend and therefore had some incongruous results.

Both Federal and Valley urge that no formula be prescribed as a means of accomplishing such revision of the joint rates as may be required in this proceeding, basing their objection to a formula on the time which probably would be required for computations as well as on the likelihood of some impractical and artificial results. The requirement of the Denison Act that rates be prescribed without a hearing made it practically necessary to employ a formula but there is no such necessity here. Since distance scales of joint barge-rail rates are not feasible, having many of the aspects of a formula, the only alternative is the prescription of individual rates. Because of the exten-

sive territory involved, these must necessarily be confined to groups or key points, as in the case of the prescribed adjustment of ocean-rail rates between official and southwestern territories. The proposals of both Federal and Valley have been constructed on that plan, these being based on differentials to be deducted from the class-100 [fol. 616] all-rail rates between a considerable number of representative points east of the Rocky Mountains. In Federal's proposal the differentials are stated as percentages of the all-rail rates, while Valley proposes specific amounts in cents per 100 pounds.

In arriving at their proposed differentials both Federal and Valley took a generally similar approach, which, as stated by Federal was to determine the "relative level of rates necessary to cover full costs, including a return on investment, for the barge portion of the through haul, and to provide for the rail portion of the through haul revenues as great as if the traffic were transported all rail." They employed different methods of making that determination, and each is complicated and difficult to describe. The computations involved theories and assumptions which necessarily are open to some of the criticism directed to them by the railroads. That criticism requires no discussion here, however, for the proposed differentials should be considered objectively without regard to the merits of the methods by which they were arrived at. Other tests of their adequacy are available. Furthermore it appears that to a considerable extent the proposed differentials rested on judgment as well as elaborate computations.

In testing the proposed differentials information concerning the costs of barge-line operation is essential. Figures which are deemed proper to use for this purpose are shown in Appendix A to this report, compiled from the Cost Section's restatement of the cost evidence before referred to. These are the estimated costs of transporting manufactures and miscellaneous traffic by barge between various representative ports.

Both Federal and Valley had a difficult problem in estimating the revenue to which the rail lines are fairly entitled for the service which they perform under the joint rates. In the meantime, however, the Commission has prescribed divisions of all-rail joint rates between southwestern and

southern territories, on the one hand, and official territory.[30] Previously it had prescribed divisions between southwestern and western trunk-line territories.[31] These systems of all-rail divisions are helpful in judging the differentials proposed in this proceeding.

For example, Federal proposes a class-35 two-way rate of 77 cents between the Twin Cities and Oklahoma City, Okla., the present all-rail rate being 84 cents. (Class 35 is used in this comparison because the rates on that class most nearly approximate those applied on the average barge-rail traffic.) Under the basis of divisions prescribed by the Commission for southwestern and western trunk-line rail carriers, the divisions of rates between Oklahoma City and the Twin Cities are 54 percent south of St. Louis and 46 percent north. Applied to the all-rail class-35 rate this basis apportions 45.36 cents for the rail haul between St. Louis and Oklahoma City. The cost of barge transportation of manu- [fol. 617] factures and miscellaneous freight between St. Louis and the Twin Cities is 17.2 cents per 100 pounds, as shown in Appendix A. This figure added to 45.36 cents makes a sum of 62.56 cents, 14.44 cents less than Federal's proposed rate of 77 cents.

Another example: Valley's proposed class-35 rate between Dayton, Ohio, and New Orleans via Cincinnati is 66 cents; the all-rail rate is 84 cents. Under the prescribed basis of divisions of all-rail rates between official and southern territories the Dayton-New Orleans rates are divided 21 percent north (55 miles) and 79 percent south (836 miles). The division of the class 35 all-rail rate for the haul from Dayton to Cincinnati, therefore, is 17.64 cents. Valley's cost between Cincinnati and New Orleans is 32 cents per 100 pounds. The sum of these two figures, 49.64 cents, is 16.5 cents less than Valley's proposed rate of 66 cents.

For the most part, Valley proposes higher differentials than Federal between common points. Between Norfolk, Va., and New Orleans via Port Birmingham Federal's proposed differential is 29 cents (class 100). Valley proposes a differential of 51 cents between the same points via Cin-

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[30] *Southwestern-Official Divisions*, 234 I. C. C. 135; *Divisions of Rates, Official and Southern Territories*, id. 175.

[31] *Divisions of Freight Rates*, 148 I. C. C. 437, 156 I. C. C. 94.

cinnati. Federal's proposed differential between St. Louis and Houston, Texas, via Baton Rouge is 35 cents (class 100) compared with 46 cents proposed by Valley between the same points.

Federal and Valley refrained from criticizing the other's proposal and are willing to leave the reconciliation to the Commission, agreeing that their competitive relation requires a common level of rates between the same points. This difference of opinion as to the size of the differentials raises an important question. The fact that Valley has established itself as a successful enterprise affords some support for the wider differentials which it favors. One may also sympathize with its expressed fear that the unprofitable operations of Federal on the Warrior division and some of its other lines be given undue weight in the establishment of a general level of joint rates to which Valley must conform.[32] There are offsetting considerations, however. It appears that on individual movements between common points Valley's costs are higher than Federal. Between St. Louis and New Orleans Appendix A shows a cost of 20.9 cents for the latter and 28.3 cents for the former. Also the special status of Federal must be kept in mind: it is a Government transportation agency, ostensibly temporary, charged with the duty of testing the feasibility and profitability of barge operation on an extensive system [fol. 618] of waterways. Its officials consider that they have demonstrated success between New Orleans and Chicago. Clearly they have no hope of putting the Warrior service on a paying basis, although there seems to be no present intention of discontinuing that operation. The future of the Missouri and Upper Mississippi divisions seems uncertain. On these two, more experimentation will be necessary to demonstrate either success or failure. In this experimental

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[32] In its brief Federal says:

> The Federal has no joint rates via the Missouri River and it is making no money on that river. There are a few joint rates in connection with the upper river service but that river is not profitable. The Lower Mississippi, however, carries the big load. If the Lower Mississippi were freed from the Upper and the Missouri and the Warrior, a very low basis of rates could be maintained between New Orleans and St. Louis with profit to the carrier.

period Federal should not be compelled to accept a lower level of joint rates than it considers justified. The experiment has been conducted substantially at cost, since, as before pointed out, Federal's average net revenue from water-line operations in the past 20 years has been approximately $11,000 per year. It has therefore earned nothing approaching the equivalent of a reasonable return on investment or of taxes. Partly in justification for such a slender margin of earnings Federal points to the fact that it has accomplished savings to the public amounting to $42,765,000 between June 1, 1924 and December 31, 1944, representing the difference between the charges on freight which it carried and those which would have been payable if the freight had moved all-rail. In effect, it has thus paid dividends to its shippers of $2,086,000 per year. Federal should certainly not be required to increase these dividends against its will in view of the fact that it receives practically no return on its investment and pays no taxes.

Federal's proposal is necessarily more comprehensive than Valley's in view of its broader operations. It bears evidence of careful preparation and is, generally speaking, conservative with respect to the measure of the differentials. The groupings apparently have been carefully worked out for the purpose of avoiding indefensible fourth-section departures and excessive circuity in deference to views which the Commission has heretofore expressed on that phase of water-rail transportation. For that reason Federal's proposal has been used to a large extent as the basis of the rates recommended in this report.

The present joint-rate structure has developed with little regard to logical port relations, and the same is true of Federal's and Valley's proposals here. Reconcilement of these is particularly necessary to prevent inconsistencies and injustice in the rates via the northern ports—Pittsburgh, Cincinnati, Evansville, Cairo, St. Louis, and Peoria. The problem is due in part to the geographical position of the Ohio and Illinois Rivers, which has caused the 20-percent differential plan to make some unjustifiable relations, notably these affecting Evansville.

The present system of barge-rail rates in some instances produces what may be termed "back hauls," which are justly criticized by railroad witnesses. The barge lines' proposals do not go far enough in doing away with these situations. Specifically, it seems highly questionable

whether rates to and from southern ports via Cincinnati should apply to and from points in Indiana as far west as Lafayette and whether Cleveland-New Orleans, for example, rates should apply via Pittsburgh. At least the Commission should not prescribe such routes.

Also it appears desirable that as a general rule the Commission not prescribe rates to and from a given interior point via more than one port. For example, there would seem to be no good reason for prescribing rates between southern ports and eastern territory except via Pittsburgh [fol. 619] or between those ports and Ohio and southeastern Michigan except via Cincinnati. This limitation would apply only to the Commission's findings and would not prevent railroads and barge lines from voluntarily making competitive rates via different ports.

Considering first the rates via Pittsburgh, there is no proposal for a change in the existing rates other than the railroads' general proposal that all differential rates be abolished. The present rates via Pittsburgh apply only in connection with American, so far as this record shows. American is satisfied with such joint rates as it now has but contends that it should have some additional ones, offering little evidence to support this contention. Whether Valley's recent extension of service to Pittsburgh affects the situation need not be considered here. For the present at least it seems necessary and desirable to make no findings concerning the rates via Pittsburgh. Those rates would not be inconsistent with the rates here proposed, except insofar as they apply to and from points in Ohio west of Youngstown, Niles, Warren, and Ashtabula.

On the other hand, rates via Cincinnati should not be prescribed to and from points east of the Ohio River above Parkersburg, W. Va. Rates via Cincinnati only should be prescribed from the following territory: Ohio, except Youngstown, Niles, Warren, Ashtabula, and points east thereof; West Virginia, except points north of the line of the Baltimore & Ohio between Parkersburg and Grafton; points in Indiana east of the line of the New York Central from North Vernon through Anderson and Goshen to South Bend; points in Michigan south and east of the line of the Grand Trunk from South Bend through Imlay City to Caseville. From and to the remainder of the lower peninsula of Michigan and points on the Pocahontas lines in Vir-

ginia which are embraced in Valley's proposal rates should also be prescribed via Cincinnati but not exclusively.

The territory west of the North Vernon-South Bend line mentioned in the foregoing paragraph is reasonably proximate in varying degree to Peoria, St. Louis, Cairo, and Evansville. From some of this territory Federal proposes joint rates via Peoria, St. Louis, and Cairo in view of the fact that in the past service via Peoria has been seasonal. Federal also wishes to continue equalized differentials via St. Louis and Cairo because operations on the river north of Cairo are subject to interruptions for various reasons. This equalization seems proper but manifestly it should include Evansville, which has justly complained in this proceeding of its past treatment under the Ex Parte 96 formula. Valley's proposal likewise falls short of complete justice to Evansville. Joint rates via Evansville as well as Cairo and St. Louis and in some cases Peoria should be prescribed to and from the territory lying west of the North Vernon-South Bend line (including South Bend) and extending to a boundary which would coincide with the line of the Louisville & Nashville from Evansville to Enfield, Ill., the line of the Baltimore & Ohio from Enfield to Pana, Ill., the line of the Illinois Central from Pana to Mendota, Ill., the line of the Chicago, Milwaukee, St. Paul & Pacific from Mendota to Janesville, Wis., and the line of the Chicago & North Western from Janesville through Fond du Lac, Wis., to Green Bay, Wis. As to the territory west of this line no discussion of port hinterlands seems necessary. The southern peninsula of Michigan including points on and north of the line of the Grand Trunk from South Bend to Caseville should be considered common to Cincinnati, Evansville, Cairo, St. Louis and Peoria, and differentials via all 5 ports should be prescribed.

[fol. 620] If any single rate were to be selected as having pivotal importance in this proceeding, it might well be the two-way rate between New Orleans and Grand Rapids, Mich. The latter point is approximately equidistant from its nearest barge ports of interchange, Peoria (298 miles) and Cincinnati (297 miles). The short-line rail and water distances from Peoria to New Orleans are 826 miles and 1,354 miles, respectively, and from Cincinnati to New Orleans, 836 miles and 1,484 miles respectively. From the standpoint of distance the routes via Cincinnati and Peoria are therefore substantially equal. Federal proposes a

differential of 46 cents (class 100) via Peoria, and Valley, one of 49 cents via Cincinnati. The former figure is the differential recommended in this report, as it would make rates which would apparently be ample to allow for all-rail divisions to the railroads and more than cover operating costs of the barge lines including a return on investment.

In the same manner differentials have been determined for deduction from the present class-100 all-rail rates between a considerable number of key points to arrive at what are deemed just and reasonable two-way and three-way joint rates to which Federal, Valley and the rail respondents would be parties. These differentials are set forth in appendices B and C. It is believed that the parties will have little difficulty in working out differentials for places other than key points in the light of such of these proposed key-point rates or others which the Commission may prescribe. The differential groups suggested by Federal appear to be well adapted to this use. Class rates and column rates would be determined by use of the usual percentages employed for that purpose.

Subsidiary Issues

In view of the size of the record in this proceeding and the length of time in which it has been pending there is an obvious desirability that the decision set at rest all the points of controversy between the barge lines and the rail lines which have arisen in the past. Although the establishment of reasonable class-rate differentials may perhaps lay the groundwork for adjustment of some of the other controverted points, the fact that this record does not indicate a definite basis of settlement of all these questions must be faced. Some of them will be mentioned.

Commodity rates.—There has probably been more controversy over joint commodity rates than over joint class rates. Much of the evidence here related to commodity rates on which conditions affecting class rates had little or no bearing. The age of that evidence raises doubt whether it portrays the present situation. In the case of the most important individual commodity, sugar, concerning which a large amount of testimony was offered, a voluntary adjustment was reached while the hearings were going on, providing for a scheme of differentials differing

from the general basis, which seems to have worked fairly well. In any event there is no proposal that those differentials be changed by the decision in this proceeding.

Valley's proposal as to commodity rates is that the "differential to be applied be that for the class or column rate most nearly corresponding to the all-rail commodity rate or the lower of two classes equally corresponding." Federal's proposal concerning commodity-rate differentials is substantially the same. Both Federal and Valley ask that the Commission's findings and order include a [fol. 621] provision by which the barge lines and rail carriers by agreement could establish joint rates different from those prescribed. As Federal says, "the Commission should not phrase its finding so as to freeze the differentials but should accord these interested carriers such freedom of action as will permit them to take care of each situation as it arises."

In the opinion of the Mississippi Valley Association "the proposal that all differentials be modified to whatever extent and in whatever manner that may be agreed to between the rail and barge carriers without consent of the shippers affected is obviously objectionable." The Association further recommends that "differentials for subnormal rates should be dealt with in a separate proceeding and the differentials to be prescribed herein should be on the normal basis." Class rates and differentials would probably be considered on a normal basis, but it would be difficult to say whether any commodity rates would be within that category.

The Denison Act contained an express provision to the effect that joint routes and rates prescribed by the Commission under that act could be changed "by agreement of the water carriers and the other participating carriers." This provision imparted a flexibility to the orders under the Denison Act which the barge lines found advantageous and they therefore ask for similar flexibility here. Such flexibility is no doubt desirable from the standpoint of the carriers, but it is impossible to find a legal basis for it in the Interstate Commerce Act. When the Commission establishes a joint rate reflecting a prescribed differential under section 307 (d), its authority is exercised through an order directed to the participating carriers. Such an order permitting disregard of its mandates at the joint

option of those carriers would seem to be self-contradictory.

In view of the foregoing circumstances it seems necessary that the findings in this proceeding be restricted to class and column rates.

"Floating" differentials.—Probably no phase of barge-rail relations has caused more mutual irritation than the question what to do with the differentials when the all-rail rate is revised. The question was particularly acute in the early "thirties" when the railroads were sharply cutting their commodity rates on account of motor or water competition. In most instances they declined to join in similarly reduced barge-rail rates unless and until they were forced to do so under compulsion of one kind or another. As a result the barge differential was reduced or eliminated permanently or temporarily with resulting loss of tonnage to the barge lines. On the other hand, the railroads complain that voluntary rate revisions undertaken by them in the interests of shippers whom they served were rendered futile by the automatic reduction of such rates for barge-rail application. Dissatisfaction over a situation of this kind led to the litigation which culminated in the Supreme Court's decision in *United States* v. *Illinois Central R. Co.*, 291 U.S. 457. One consequence of that decision was to cast doubt on the interpretation placed on the Denison Act by the Commission in *Procedure Under Barge Line Act*, 148 I.C.C. 129, 137, where it said:

> [fol. 622] The immediately following direction that we shall fix "reasonable minimum differentials between all rail rates and joint rates in connection with said water service" also makes it clear that the latter shall be fixed in terms of a relationship with the corresponding all-rail rates, i. e., that we shall fix a minimum spread which shall persist even if changes are made in the level of the rates.

The Court's decision and the subsequent modification of the statutory law by Congress serve to make it doubtful whether the word "differential" as used in section 307 (d) means "a minimum spread which shall persist even if changes are made in the level of the rates" or is a difference attached only to the existing rail rate. This is a difficult legal question which seems certain to arise in the future if transportation history repeats itself. The ques-

tion has not given serious trouble in connection with class-rate revisions. So far as class rates are concerned, the principle of "floating" differentials seems sound as stated by Federal in the following paragraph:

> That the differentials in terms of percentages of all-rail rates, herein proposed as reasonable minimum differentials between all-rail rates and joint rail-barge, barge-rail or rail-barge-rail rates, be maintained regardless of the level of said all-rail rates, until the further order of the Commission; and that differentials of specific amounts * * * shall be increased or reduced in amounts proportionate to such increases or reductions as may be hereafter applied to all-rail rates on which said rail-barge, barge-rail, or rail-barge-rail rates are based.

Federal's proposal was made prior to the 10 percent increase in class rates which took place in March 1938 and it has been understood as a scheme of percentages to be applied to the present rates. For the sake of convenience the differentials stated in appendices B and C are in cents per 100 pounds. When and if the class rates prescribed in *Class Rate Investigation, 1939*, 262 I.C.C. 447, go into effect, the principle stated in the second clause of the above quotation should be applied.

Transit.—Another major point of controversy between railroads and barge lines has grown out of the fact that the former have been unwilling to apply to barge-rail rates the same transit arrangements available to shippers on all-rail rates. One of the most recent examples of this situation referred to in the record is a railroad tariff of general application which permits storage of export freight in transit at practically any place in the United States. The barge lines sought unsuccessfully to include barge-rail traffic in this tariff, which was extensively used on lend-lease shipments.

In its first report on barge-rail rates, 77 I.C.C. 317, 363, the Commission said:

> With respect to the various transit arrangements extended to shippers in connection with all-rail rates but withheld in the case of rail-and-barge rates, we are of the opinion that such arrangements should be extended to the latter rates, but that in such cases

the originating rail line will usually be entitled, by reason of such extension, to a concession in divisions. The record does not permit a more specific conclusion upon this point.

[fol. 623] The orders under the Denison Act, which required the Commission to prescribe "reasonable rules, regulations, and practices" in connection with the joint rates, contained a similar provision. The barge lines here seek findings from the Commission which (1) would require the railroads to apply to barge-rail rates the same transit arrangements which are maintained in connection with all-rail rates and (2) would permit the barge lines to establish transit arrangements at points directly served by them in connection with barge-rail rates even though the corresponding all-rail rates are not subject to transit arrangements. These two situations will be discussed separately:

The first situation was involved in two recent decisions of divisions of the Commission: *Storage in Transit of Imported Rubber*, 256 I.C.C. 183, and *Inland Waterways Corp.* v. *Southern Ry. Co.*, 263 I.C.C. 227. In the first of these reports division 2 found that the failure to permit transit in connection with barge-rail rates was unreasonable and also discriminatory in violation of section 3(4). In the second, division 3 made a finding of discrimination only. The difference between these decisions indicates the desirability of caution in recommending a general finding that exclusion of barge-rail rates from transit arrangements is unreasonable. A finding of that kind would require extension of all such arrangements to barge-rail rates even though some of them might be of doubtful propriety in their application of all-rail rates. From the two decisions above mentioned the principle may be deduced that failure to permit transit in connection with barge-rail rates where it applies to all-rail rates is at least potentially a violation of section 3(4). Establishment of such violations by a complaining barge line in an individual case ordinarily should not be difficult. The safer course here would seem to be not to make a blanket finding but to deal with situations of this kind in complaints directed to particular situations.

To a large extent the controversy over transit has related to storage of sugar. Rates on this commodity are

delicately balanced and reflect a sensitive competitive situation. Since it is unnecessary to make findings concerning sugar rates in this proceeding, it seems desirable not to pass on the related question what further storage-in-transit arrangements, if any, should be required in official territory on barge-rail sugar. The absence of current information bearing on the matter furnishes another reason for not dealing with the question here.

The second situation before outlined involved sugar rates in southern territory only. For many years Federal has wanted to permit storage of sugar in transit at its ports of interchange in connection with barge-rail rates from New Orleans to southern destinations. Since the southern railroads do not provide transit arrangements for all-rail shipments of sugar, they have objected to participation in barge-rail rates subject to transit. In *Sugar via Barge Routes from New Orleans*, 183 I.C.C. 109, division 2 considered a proposal by Federal to establish transit on barge-rail sugar stored at Port Birmingham and Holt, Ala. The suspended schedules were found not to have been justified without prejudice to the filing of schedules applying all-rail rates on sugar stored in transit on barge-rail routes. The entire Commission denied a petition for [fol. 624] reconsideration of that finding.[33] Federal again asks reconsideration of the question in the light of evidence which it has submitted for the purpose of showing that disadvantages connected with storage of barge-rail sugar make the transit arrangement not sufficiently attractive unless it is applied to a rate lower than the all-rail rate. Its contentions on this score are opposed by the southern railroads and the Savannah Sugar Refining Corporation. The question involved is closely bound up with the general question of the level of barge-rail rates on sugar from New Orleans to southern points, concerning which no findings are recommended in this report. It is therefore considered inadvisable to make a recommendation with respect to the question of transit. The decision before referred to was rendered 14 years ago. If Federal considers that transit should now be permitted on differential barge-rail rates in the light of present conditions, it can readily raise the question by filing tariffs subject to suspension.

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[33] That case was not among those reopened for further hearing in connection with this proceeding.

Proposed Findings

The Commission should find:

1. That the amounts set forth in Appendix B and Appendix C are justified as reasonable differentials to be deducted from the present class-100 domestic all-rail rates to and from the key points therein named to determine joint class-100 rates applicable to the transportation of property by the barge lines and railroad carriers which are respondents in this proceeding;

2. That joint rates applicable to the transportation of export, import, and coastwise traffic by said barge lines and railroad carriers should be determined by applying to the joint rates determined under finding 1 the percentage ratio of all-rail class-100 rates on export, import, and coastwise traffic to all-rail class-100 rates;

3. That rates on other classes and columns should be determined by application of the usual percentages to such joint class-100 rates;

4. That the establishment of joint rates so determined and of through routes embracing the lines of the respondent barge lines and the lines of respondent rail carriers comprising the shortest working routes between the key points named in Appendix B and Appendix C and the points of interchange with a barge line is necessary and desirable in the public interest.

[fol. 625] APPENDIX A

Port-to-Port Costs of the Federal Barge Lines for the Transportation of Manufactures and Miscellaneous Articles

	Cents per 100 pounds
Between New Orleans and	
Port Birmingham	19.0
Mobile	11.8
Baton Rouge	11.9
Vicksburg	13.8
Greenville	14.7
Helena	16.2
Memphis	16.9
Cairo	19.1

	Cents per 100 pounds
St. Louis	20.9
Peoria	23.8
Rock Island	23.9
Minneapolis	27.5
Between Baton Rouge and	
Vicksburg	12.5
Memphis	15.7
St. Louis	19.6
Chicago	25.3
Minneapolis	26.2
Between Vicksburg and	
Greenville	11.5
Helena	13.0
Memphis	13.8
Cairo	16.0
St. Louis	17.7
Peoria	20.7
Chicago	23.4
Rock Island	20.7
Minneapolis	24.3
Between Memphis and	
Cairo	12.8
St. Louis	14.6
Peoria	17.5
Chicago	20.2
Rock Island	17.5
Minneapolis	21.2
Between Cairo and	
St. Louis	12.4
Peoria	15.3
Chicago	18.0
Minneapolis	19.0
Between St. Louis and	
Peoria	13.1
Chicago	15.8
Rock Island	13.6
Minneapolis	17.2

[fol. 626]

	Cents per 100 pounds
Between Minneapolis and	
Dubuque	13.3
Rock Island	14.3
Burlington	15.0
Between Peoria and	
Chicago	12.3

Port-to-Port Costs of the Mississippi Valley for the Transportation of Manufactures and Miscellaneous Articles

Between Cincinnati and	
New Orleans	32.0
Baton Rouge	30.6
Vicksburg	28.4
Memphis	24.8
Between Evansville and	
New Orleans	28.4
Baton Rouge	26.9
Vicksburg	24.8
Memphis	21.2
Between St. Louis and	
New Orleans	28.3
Baton Rouge	26.8
Vicksburg	24.7
Memphis	21.1

[fol. 627]

APPENDIX B

Proposed Differentials in Cents per 100 Pounds to be Deducted from Present Class 100 All-Rail Rates in Determining Joint Two-Way Rates with Barge Lines

SECTION 1

Between New Orleans, La.
Baton Rouge, La. (except as noted)

And	Via Cincinnati	Peoria	Evansville	St. Louis Cairo
Norfolk, Va.	29			
Charleston, W. Va.	46			
Parkersburg, W. Va.	46			
Cleveland, Ohio	46			
Columbus, Ohio	46			
Detroit, Mich.	46			
Saginaw, Mich.	46	46	42	42
Grand Rapids, Mich.	46	46	42	42
South Bend, Ind.	46	46	42	42
Indianapolis, Ind.			42	42
Chicago, Ill.		46	42	42
Milwaukee, Wis.		46	42	42
Centralia, Ill.				42

	Via Twin Cities	Iowa Ports [1]			Kansas City
Fargo, N. Dak.	52			36	
Rhinelander, Wis.	48			40	
Mason City, Iowa	48			42	
Omaha, Nebr.				38	41
Cheyenne, Wyo.				35	39
Saline, Kans.					32
Chillicothe, Mo.				43	

	Via Cairo	Memphis
Bismarck, Mo.	37	
Wichita, Kans.		29
Joplin, Mo.		31
Enid, Okla.		25 [2]
Hopkinsville, Ky.		29
Corinth, Miss.		22

	Via Helena	Greenville	Vicksburg	Baton Rouge
Stuttgart, Ark.	28			
Clarksdale, Miss.		22		
Dallas, Tex.			22 [3]	
Corsicana, Tex.			19 [3]	
El Dorado, Ark.			25 [3]	
Belzoni, Miss.			22 [3]	
Alexandria, La.				10 [3]
Natchez, Miss.				10 [3]

	Via Mobile	Port Birmingham
Savannah, Ga.	20 [3]	
Augusta, Ga.		22
Knoxville, Tenn.		29

[fol. 628]

SECTION 2

Between Baton Rouge, La.

And	Via Vicksburg	New Orleans	Mobile
Dallas, Tex.	17		
Corsicana, Tex.	13		
El Dorado, Ark.	21		
Belzoni, Miss.	18		
Jackson, Miss.	8		
Biloxi, Miss.		9	
Savannah, Ga.			22

SECTION 3

Between Vicksburg, Miss.

And	Via Twin Cities	St. Louis Cairo	Iowa Ports [1]	Peoria	Kansas City
Fargo, N. Dak.	52	35			
Rhinelander, Wis.	43	36			
Mason City, Iowa	44	37			
Cheyenne, Wyo.		32			36
Omaha, Nebr.		34			37
Salina, Kans.					30
			Evansville		
Chicago, Ill.		35	35	37	
Milwaukee, Wis.		35	35	37	
	Via Cincinnati				
South Bend, Ind.	37	35	35	37	
Grand Rapids, Mich.	37	35	35	37	
Saginaw, Mich.	37	35	35	37	
Detroit, Mich.	37				
Cleveland, Ohio	37				
Columbus, Ohio	37				
Parkersburg, W. Va.	37				
Charleston, W. Va.	37				
Norfolk, Va.	26				
Indianapolis, Ind.		35	35		
Decatur, Ill.		38	38		
Centralia, Ill.		36			

	Via Cairo	Memphis	Helena	Greenville
Bismarck, Mo.	36			
Wichita, Kans.		16		
Enid, Okla.		13 [2]		
Joplin, Mo.		23 [4]		
Hopkinsville, Ky.		22		
Corinth, Miss.		17		
Stuttgart, Ark.			19	
Clarksdale, Miss.				12

	Via Baton Rouge New Orleans	New Orleans
Corpus Christi, Tex.	13	
Houston, Tex.	15	
New Iberia, La.	19	
Biloxi, Miss.		9

[fol. 629]

SECTION 4

Between Greenville, Miss.

And	Via Twin Cities	Iowa Ports [1]	St. Louis Cairo	Peoria
Fargo, N. Dak.	45		28	
Rhinelander, Wis.	38		30	
Mason City, Iowa		37	31	
Milwaukee, Wis.			36	41
Chicago, Ill.			36	41
South Bend, Ind.			30	33

	Via Kansas City
Cheyenne, Wyo.	29
Omaha, Nebr.	27
Salina, Kans.	26

	Akron, Ohio	Via Cairo	Memphis	Helena
Bismarck, Mo.		35		
Evansville, Ind.		34		
Centralia, Ill.		34		
Parkersburg, W. Va.		23		
Wichita, Kans.			13	
Enid, Okla.			11	
Joplin, Mo.			17	
Hopkinsville, Ky.			19	
Corinth, Miss.			13	
Stuttgart, Ark.				15

	Via Vicksburg	Baton Rouge	New Orleans
San Antonio, Tex.	13		
Navasota, Tex.	13		
Alexandria, La.	15		
Brookhaven, Miss.	11		
Corpus Christi, Tex.		18	18
Houston, Tex.		20	20
New Iberia, La.		23	23
Biloxi, Miss.			11

SECTION 5

Between Memphis, Tenn.
Helena, Ark. (except as noted)

And	Via Twin Cities	Iowa Ports [1]	St. Louis Cairo	Kansas City
Fargo, N. Dak.	43		24	
Rhinelander, Wis.	36		26	
Mason City, Iowa		41	33	
Cheyenne, Wyo.			20	24
Omaha, Nebr.			22	27
Salina, Kans.				20

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SECTION 5 (Continued)

	Via Peoria	Cincinnati	St. Louis Cairo	Evansville
Milwaukee, Wis.	35		29	29
Chicago, Ill.	35		29	29
South Bend, Ind.	29	29	24	24
Grand Rapids, Mich.	29	29	24	24
Saginaw, Mich.	29	29	24	24
Detroit, Mich.		29		
Cleveland, Ohio		29		
Columbus, Ohio		29		
Parkersburg, W. Va.		29		
Charleston, W. Va.		29		
Norfolk, Va.		26		
Indianapolis, Ind.			24	24

	Via Cairo	St. Louis	
Decatur, Ill.	29	29	29
Centralia, Ill.	29	29	
Bismarck, Mo.	29		

	Via Vicksburg	Baton Rouge	New Orleans
San Antonio, Tex.	21 [5]		
Navasota, Tex.	21 [5]		
Alexandria, La.	24 [5]		
Brookhaven, Miss.	19 [5]		
Corpus Christi, Tex.		22 [5]	22 [5]
Houston, Tex.		24 [5]	24 [5]
New Iberia, La.		27 [5]	27 [5]
Biloxi, Miss.			19 [5]

SECTION 6

Between Helena, Ark.

And	Via Memphis	Vicksburg	Baton Rouge	New Orleans
Wichita, Kans.	8			
Joplin, Mo.	13			
Hopkinsville, Ky.	13			
Corinth, Miss.	8			
San Antonio, Tex.		15		
Navasota, Tex.		15		
Alexandria, La.		19		
Brookhaven, Miss.		13		
Corpus Christi, Tex.			20	20
Houston, Tex.			22	22
New Iberia, La.			25	
Biloxi, Miss.				13

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SECTION 7

Between Cairo, Ill.

And	Via Twin Cities	Iowa Ports [1]	Peoria	St. Louis
Fargo, N. Dak.	44			15
Rhinelander, Wis.	31			15
Mason City, Iowa		25		15

	Via Kansas City
Norfolk, Nebr.	25
Denver, Colo.	30
Cheyenne, Wyo.	
Omaha, Nebr.	

	Via Memphis	Via Vicksburg	Baton Rouge	New Orleans
Fort Smith, Ark.	19			
Dallas, Tex.	24	24		
Little Rock, Ark.	17			
Meridian, Miss.	22	17		
San Antonio, Tex.	32	32		
Navasota, Tex.	32	32		
Alexandria, La.	36	36		
Brookhaven, Miss.		17		
Corpus Christi, Tex.			33	33
Houston, Tex.			36	36
New Iberia, La.			39	39
Biloxi, Miss.				30

SECTION 8

Between St. Louis, Mo.

And	Via Twin Cities	Iowa Ports [1]	Cairo	Memphis
Fargo, N. Dak.	36			
Rhinelander, Wis.	23			
Mason City, Iowa		15		
Jackson, Tenn.			10	
Atlanta, Ga.			16	
Montgomery, Ala.			16	
Fort Smith, Ark.				20
Little Rock, Ark.				25

	Via Vicksburg
Meridian, Miss.	23
Dallas, Tex.	24

	Via Vicksburg	Baton Rouge	New Orleans	Kansas City
San Antonio, Tex.	32	32		
Navasota, Tex.	32	32		
Alexandria, La.	35	35		
Brookhaven, Miss.	23			
Corpus Christi, Tex.		33	33	
Houston, Tex.		35	35	
New Iberia, La.		38	38	
Biloxi, Miss.			36	
Norfolk, Nebr.				22
Denver, Colo.				25
Enid, Okla.				18

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SECTION 9

Between Peoria, Ill.

And	Via St. Louis	Cairo	Memphis	Vicksburg
Joplin, Mo.	10			
Paragould, Ark.		19		
Atlanta, Ga.		19		
Jackson, Tenn.		19		
Montgomery, Ala.		26		
Fort Smith, Ark.			16	
Dallas, Tex.			31	
Little Rock, Ark.			35	
Meridian, Miss.			35	
San Antonio, Tex.				35
Navasota, Tex.				35
Alexandria, La.				39
Brookhaven, Miss.				42

	Via Baton Rouge	New Orleans	Kansas City
Corpus Christi, Tex.	39	39	
Houston, Tex.	41	41	
New Iberia, La.	44	44	
Biloxi, Miss.		42	
Denver, Colo.			25
Enid, Okla.			22

SECTION 10

Between Chicago, Ill.

And	Via St. Louis	Cairo	Memphis	Vicksburg	Kansas City
Joplin, Mo.	22				
Paragould, Ark.		24			
Hopkinsville, Ky.		10			
Atlanta, Ga.		19			
Jackson, Tenn.		12			
Montgomery, Ala.		26			
Fort Smith, Ark.			24		
Little Rock, Ark.			37		
Dallas, Tex.			34		
Meridian, Miss.			35		
San Antonio, Tex.				41	
Navasota, Tex.				41	
Alexandria, La.				44	
Brookhaven, Miss.				42	
Denver, Colo.					23
Enid, Okla.					22

	Via Baton Rouge	New Orleans
Corpus Christi, Tex.	44	44
Houston, Tex.	46	46
New Iberia, La.	49	49
Biloxi, Miss.		42

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SECTION 11

Between Dubuque, Iowa
Rock Island, Ill.
Burlington, Iowa

And	Via Twin Cities	St. Louis
Fargo, N. Dak.	28 (Burlington) 24 (Dubuque, Rock Island)	
Rhinelander, Wis.	14 (Burlington) 11 (Dubuque, Rock, Rock Island)	
Joplin, Mo.		13 (Burlington) 15 (Rock Island) 19 (Dubuque)
Knoxville, Tenn.		20
	Via Cairo	
Paragould, Ark.	24 (Burlington) 26 (Rock Island) 30 (Dubuque)	
Atlanta, Ga.	25	Via Memphis
Montgomery, Ala.	25	
Dallas, Tex.		24
Fort Smith, Ark.		13 (Burlington, Rock Island) 19 (Dubuque)
Little Rock, Ark.		30 (Burlington, Rock Island) 35 (Dubuque)
Meridian, Miss.		35
	Via Vicksburg	
San Antonio, Tex.	19 (Burlington, Rock Island) 24 (Dubuque)	
Navasota, Tex.	24 (Burlington, Rock Island) 30 (Dubuque)	
Alexandria, La.	35 (Burlington, Rock Island) 41 (Dubuque)	
Brookhaven, Miss.	41	
	Via Baton Rouge	New Orleans
Corpus Christi, Tex.	19 (Burlington, Rock Island) 24 (Dubuque)	19 (Burlington, Rock Island) 24 (Dubuque)
Houston, Tex.	24 (Burlington, Rock Island) 30 (Dubuque)	24 (Burlington, Rock Island) 30 (Dubuque)
New Iberia, La.	35 (Burlington, Rock Island) 44 (Dubuque)	35 (Burlington, Rock Island) 44 (Dubuque)
Biloxi, Miss.		41

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SECTION 12

Between St. Paul, Minn.
Minneapolis, Minn.

And	Via Dubuque	Rock Island	Burlington	St. Louis
Cedar Rapids, Iowa	13			
Chicago, Ill.	20			
Peoria, Ill.		22		
Chillicothe, Mo.		13		
Kansas City, Mo.			15	
Springfield, Ill.			26	
Centralia, Ill.				28
Joplin, Mo.				18
Cincinnati, Ohio				22
Knoxville, Tenn.				24

	Via Cairo	Memphis	Vicksburg
Paragould, Ark.	35		
Atlanta, Ga.	37		
Fort Smith, Ark.		19	
Dallas, Tex.		24	
Little Rock, Ark.		44	
Meridian, Miss.		47	
San Antonio, Tex.			24
Navasota, Tex.			30
Alexandria, La.			45
Brookhaven, Miss.			56

	Via Baton Rouge	New Orleans
Corpus Christi, Tex.	24	24
Houston, Tex.	33	33
New Iberia, La.	50	50
Biloxi, Miss.		51

SECTION 13

Between Cincinnati, Ohio

And	Via Memphis	Vicksburg	Baton Rouge	New Orleans
Little Rock, Ark.	34			
Fort Smith, Ark.	29			
Ardmore, Okla.	29			
Oklahoma City, Okla.	29			
Wichita Falls, Tex.	29			
Corinth, Miss.	17 [7]			
Meridian, Miss.		29 [8]		
Dallas, Tex.		34		
Shreveport, La.		40		
Waco, Tex.		40	40	
San Antonio, Tex.			41	
Corpus Christi, Tex.			44	
Houston, Tex.			46	
Lafayette, La.			49	
Mobile, Ala.				34 [9]

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SECTION 14

Between Louisville, Ky.

And	Via Memphis	Via Vicksburg	Baton Rouge	New Orleans
Little Rock, Ark.	31			
Fort Smith, Ark.	26			
Oklahoma City, Okla.	26			
Wichita Falls, Tex.	26			
Corinth, Miss.	17 [7]			
Meridian, Miss.		26 [8]		
Dallas, Tex.		31		
Shreveport, La.		37		
Waco, Tex.		37	37	
San Antonio, Tex.			35	
Corpus Christi, Tex.			39	
Houston, Tex.			41	
Lafayette, La.			44 [4]	
Mobile, Ala.				31 [9]

SECTION 15

Between Evansville, Ind.

And	Via Memphis	Via Vicksburg	Baton Rouge	New Orleans
Little Rock, Ark.	27			
Fort Smith, Ark.	23 [6]			
Oklahoma City, Okla.	23			
Wichita Falls, Tex.	23			
Dallas, Tex.		30		
Shreveport, La.		32		
Waco, Tex.		32	32	
Meridian, Miss.		23		
Corinth, Miss.	17 [7]			
San Antonio, Tex.			32	
Navasota, Tex.			32	
Alexandria, La.			35	
Corpus Christi, Tex.			33	
Houston, Tex.			35	
Mobile, Ala.				22 [9]

SECTION 16

Between Mobile, Ala.

And	Via Twin Cities	Iowa Ports [1]	St. Louis Cairo	Kansas City
Fargo, N. Dak.	40		25	
Rhinelander, Wis.	36		29	
Mason City, Iowa		37	30	
Cheyenne, Wyo.			23	26
Omaha, Nebr.			26	29
Salina, Kans.				20
Chillicothe, Mo.			31	

And	Via Peoria		
Milwaukee, Wis.	39	31	
South Bend, Ind.	35	31	
Akron, Ohio		[illegible]	

[fol. 636]

SECTION 16 (Continued)

	Via Cairo	Memphis	Helena	Greenville	Vicksburg
Bismarck, Mo.	29				
Centralia, Ill.	31				
Evansville, Ind.	22				
Parkersburg, W. Va.	18				
Wichita, Kans.		16			
Enid, Okla.		14			
Joplin, Mo.		20			
Hopkinsville, Ky.		18			
Corinth, Miss.		11			
Stuttgart, Ark.			16		
Clarksdale, Miss.				11	
Dallas, Tex.					11
Corsicana, Tex.					8
El Dorado, Ark.					14
Belzoni, Miss.					11
Jackson, Miss.					6

	Via Baton Rouge	New Orleans	Port Birmingham
Alexandria, La.	8		
Waco, Tex.		10	
Palestine, Tex.		13	
Houston, Tex.		20	
Knoxville, Tenn.			24
Augusta, Ga.			18

SECTION 17

Between Port Birmingham, Ala.

And	Via New Orleans	Mobile
Waco, Tex.	21	
Palestine, Tex.	24	
Houston, Tex.	31	
Biloxi, Miss.		24

SECTION 18

Between Kansas City, Mo.

And	Via Peoria	St. Louis	Cairo	Memphis	Vicksburg	New Orleans
Chicago Ill.	21					
Springfield, Ill.		18				
Cincinnati, Ohio		25				
Atlanta, Ga.		19				
Columbus, Ga.			25			
Meridian, Miss.				27		
Brookhaven, Miss.					33	
Biloxi, Miss.						31

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Notes

[1] Dubuque, Clinton, Davenport (including Rock Island, Ill.) and Burlington.

[2] This differential is not proposed for application to rates to and from points west of the line of the Missouri-Kansas-Texas R. R. Co. between Elk City and Woodward, Okla.

[3] New Orleans only.

[4] This differential is not proposed for application to rates to and from points south of the line of the Missouri & Arkansas Ry. Co. between Joplin, Mo., and Wheatley, Ark.

[5] Memphis only.

[6] This differential is not proposed for application to rates to and from points in Arkansas north of the line of the Missouri Pacific R. R. Co. from Memphis, Tenn., to Van Buren, Ark., via Bald Knob and Little Rock, Ark.

[7] This differential is not proposed for application to rates to and from points east of the line of the Gulf, Mobile & Ohio R. R. Co. between Corinth and West Point, Miss.

[8] This differential is not proposed for application to rates to and from points east of Meridian, Miss.

[9] This differential is not proposed for application to rates to and from points east of Mobile, Ala.

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APPENDIX C

Proposed Differentials in Cents per 100 Pounds to be Deducted from Present Class 100 All-Rail Rates in Determining Joint Three-Way Rates with Barge Lines.

SECTION 1

Between Fargo, N. Dak.

And	Via Twin Cities Dubuque	Twin Cities Iowa Ports [1]	Twin Cities Burlington	Twin Cities St. Louis
Chicago, Ill.	16			
Peoria, Ill.		20		
Springfield, Ill.			24	
Centralia, Ill.				26
Knoxville, Tenn.				22
Cincinnati, Ohio				20
Cedar Rapids, Iowa	13			
Chillicothe, Mo.		13		
Kansas City, Mo.			15	
Joplin, Mo.				18 [2]

SECTION 2

Between Paragould, Ark.

And	Via Twin Cities Cairo	Peoria Cairo	Iowa Ports [1] Cairo
Fargo, N. Dak.	33		
Rhinelander, Wis.	23		
Mason City, Iowa			17
Milwaukee, Wis.		11	
South Bend, Ind.		13	

SECTION 3

Between Montgomery, Ala.

And	Via Twin Cities Cairo	Iowa Ports [1] Cairo	Peoria Cairo
Fargo, N. Dak.	16		
Rhinelander, Wis.	19 [3]		
Mason City, Iowa		18	
Milwaukee, Wis.			19

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SECTION 4

Between Atlanta, Ga.

And	Via Twin Cities Cairo	Iowa Ports [1] Cairo
Fargo, N. Dak.	26	
Mason City, Iowa		17

SECTION 5

Between Fort Smith, Ark.

And	Via Twin Cities Memphis	Peoria Memphis	St. Louis Cairo Memphis	Evansville Memphis
Rhinelander, Wis.	13 [4]			
Milwaukee, Wis.		16	13	13
Decatur, Ill.			15	15
Centralia, Ill.			15	
	Via Cincinnati Memphis			
Saginaw, Mich.	19	19	15	15
Grand Rapids, Mich.	19	19	15	15
South Bend, Ind.	19	19	15	15
Indianapolis, Ind.			15	15
Chicago, Ill.		19	13	13
Detroit, Mich.	19			
Columbus, Ohio	19			
Cleveland, Ohio	19			
Parkersburg, W. Va.	19			
Charleston, W. Va.	19			
Norfolk, Va.	19			

SECTION 6

Between Dallas, Texas

And	Via Twin Cities Memphis	St. Louis Cairo Memphis	Iowa Ports [1] Memphis	Peoria Memphis	Evansville Memphis
Fargo, N. Dak.	24				
Rhinelander, Wis.	19	15			
Mason City, Iowa			19		
Milwaukee, Wis.		24		30	

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SECTION 6 (Continued)

	Via Cincinnati Memphis	St. Louis Cairo Memphis	Iowa Ports [1] Memphis	Peoria Memphis	Evansville Memphis
South Bend, Ind.	26	24		26	24
Saginaw, Mich.	26	24		26	24
Grand Rapids, Mich.	26	24		26	24
Chicago, Ill.		24		29	24
Detroit, Mich.	26				
Columbus, Ohio	26				
Cleveland, Ohio	26				
Parkersburg, W. Va.	26				
Charleston, W. Va.	26				
Norfolk, Va.	26				
Decatur, Ill.		24			24
Centralia, Ill.		20			
Indianapolis, Ind.		16			16

SECTION 8

Between Little Rock, Ark.

And	Via Twin Cities Memphis	St. Louis Cairo Memphis	Iowa Ports [1] Memphis	Peoria Memphis
St. Cloud, Minn.	41	15		
Rhinelander, Wis.	35	15		
Mason City, Iowa		12	30	
Milwaukee, Wis.		18		26
	Via Cincinnati Memphis		Evansville Memphis	
South Bend, Ind.	24	20	20	24
Saginaw, Mich.	24	20	20	24
Grand Rapids, Mich.	24	20	20	24
Detroit, Mich.	24			
Cleveland, Ohio	24			
Columbus, Ohio	24			
Parkersburg, W. Va.	24			
Charleston, W. Va.	24			
Norfolk, Va.	24			
Decatur, Ill.		17	17	
Centralia, Ill.		14		
Indianapolis, Ind.		16	16	

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SECTION 9

Between Meridian, Miss.

And	Via Twin Cities Memphis	Cairo St. Louis Memphis Vicksburg	Iowa Ports [1] Memphis	Peoria Memphis
Fargo, N. Dak.	32	19		
Rhinelander, Wis.	28	19		
Mason City, Iowa		14	24	
Milwaukee, Wis.		14	25	24

	Via Cincinnati Vicksburg		Evansville Memphis Vicksburg	
South Bend	20 [5]	14	14	20
Chillicothe, Mo.		19		
Decatur, Ill.		17	17	
Centralia, Ill.		17		
Bismarck, Mo.		12		
Indianapolis, Ind.		17	17	
Grand Rapids, Mich.	20 [5]			20
Saginaw, Mich.	20 [5]			20
Cleveland, Ohio	20 [5]			
Detroit, Mich.	20 [5]			
Columbus, Ohio	20 [5]			
Parkersburg, W. Va.	20 [5]			

SECTION 10

Between San Antonio, Texas

And	Via St. Louis Cairo Vicksburg	Peoria Vicksburg	Cincinnati Baton Rouge	Evansville Baton Rouge
Rhinelander, Wis.	21			
Milwaukee, Wis.	33	39		
South Bend, Ind.	30	33	33	30
Grand Rapids, Mich.	30	33	33	30
Saginaw, Mich.	30	33	33	30
Cleveland, Ohio			33	
Detroit, Mich.			33	
Columbus, Ohio			33	
Norfolk, Va.			33	
Charleston, W. Va.			33	
Parkersburg, W. Va.			33	
Decatur, Ill.	30			30
Centralia, Ill.	30			
Indianapolis, Ind.	27			27

	Via Memphis Vicksburg
Hopkinsville, Ky.	15

[fol. 642]

SECTION 11

Between Navasota, Texas

And	Via Twin Cities Vicksburg	Cairo St. Louis Vicksburg Baton Rouge	Iowa Ports [1] Vicksburg	Peoria Vicksburg
St. Cloud, Minn.	24			
Rhinelander, Wis.	24	21		
Cedar Rapids, Iowa			19	
Milwaukee, Wis.		30		35

	Via Cincinnati Baton Rouge		Evansville Baton Rouge	
South Bend, Ind.	33	30	30	33
Grand Rapids, Mich.	33	30	30	33
Saginaw, Mich.	33	30	30	33
Decatur, Ill.		30	30	
Centralia, Ill.		30		
Columbus, Ohio	33			
Detroit, Mich.	33			
Cleveland, Ohio	33			
Parkersburg, W. Va.	33			
Charleston, W. Va.	33			
Norfolk, Va.	33			

	Via Cairo St. Louis Vicksburg			Memphis Vicksburg
Indianapolis, Ind.	28			
Hopkinsville, Ky.			28	
				15

SECTION 12

Between Alexandria, La.

And	Via Twin Cities Vicksburg	Cairo St. Louis Vicksburg Baton Rouge	Iowa Ports [1] Vicksburg	Peoria Vicksburg
St. Cloud, Minn.	41	19		
Rhinelander, Wis.	39	24		
Cedar Rapids, Iowa		19	30	
Milwaukee, Wis.		33		39

	Via Cincinnati Baton Rouge		Evansville Baton Rouge	
South Bend, Ind.	37	33	33	37
Grand Rapids, Mich.	37	33	33	37
Saginaw, Mich.	37	33	33	37
Detroit, Mich.	37			
Cleveland, Ohio	37			
Parkersburg, W. Va.	37			
Charleston, W. Va.	37			
Norfolk, Va.	37			
Decatur, Ill.		33	33	
Indianapolis, Ind.				

[fol. 643]

SECTION 12 (Continued)

	Via Memphis Vicksburg
Hopkinsville, Ky.	19

SECTION 12

Between Brookhaven, Miss.

And	Via Twin Cities Vicksburg	Cairo St. Louis Vicksburg	Iowa Ports [1] Vicksburg	Peoria Vicksburg
Fargo, N. Dak.	38	26		
Rhinelander, Wis.	35	24		
Mason City, Iowa		30	32	
Milwaukee, Wis.		30		39

	Via Cincinnati Vicksburg		Evansville Vicksburg	
South Bend, Ind.	20	17	17	20
Grand Rapids, Mich.	20	17	17	20
Saginaw, Mich.	20	17	17	20
Detroit, Mich.	23			
Cleveland, Ohio	23			
Columbus, Ohio	23			
Parkersburg, W. Va.	23			
Charleston, W. Va.	23			
Norfolk, Va.	23			
Cheyenne, Wyo.		24		
Omaha, Nebr.		26		
Chillicothe, Mo.		30		
Indianapolis, Ind.		17	17	
Decatur, Ill.		17	17	
Bismarck, Mo.		17		
Centralia, Ill.		17		

	Via Memphis Vicksburg
Joplin, Mo.	16

[fol. 644]

SECTION 13

Between Corpus Christi, Texas

And	Via Cairo St. Louis Baton Rouge New Orleans	Peoria Baton Rouge New Orleans	Evansville Baton Rouge	Cincinnati Baton Rouge
Rhinelander, Wis.	20			
Milwaukee, Wis.	31	35	31	
South Bend, Ind.	31	35	31	35
Grand Rapids, Mich.	31	35	31	35
Saginaw, Mich.	31	35	31	35
Detroit, Mich.				35
Cleveland, Ohio				35
Columbus, Ohio				35
Parkersburg, W. Va.				35
Charleston, W. Va.				35
Indianapolis, Ind.	29		29	
Decatur, Ill.	31		31	
Centralia, Ill.	31			

	Via Memphis Baton Rouge New Orleans
Hopkinsville, Ky.	18

SECTION 14

Between Houston, Texas

And	Via Twin Cities Baton Rouge New Orleans	Cairo St. Louis Baton Rouge New Orleans	Iowa Ports [1] Baton Rouge New Orleans	Peoria Baton Rouge New Orleans
St. Cloud, Minn.	33	19		
Rhinelander, Wis.	30	24		
Cedar Rapids, Iowa	24	19	24	

	Evansville Baton Rouge	
Milwaukee, Wis.	35	40

	Via Cincinnati Baton Rouge			
South Bend, Ind.	41			
Grand Rapids, Mich.	41	35	35	41
Saginaw, Mich.	41	35	35	41
Detroit, Mich.	41			41

[fol. 645]

SECTION 14 (Continued)

And	Via Cairo St. Louis Baton Rouge New Orleans	Evansville Baton Rouge	Memphs Baton Rouge New Orleans
Decatur, Ill.	35	35	
Indianapolis, Ind.	33	33	
Centralia, Ill.	35		
Hopkinsville, Ky.			24

And	Via Cincinnati Baton Rouge	Port Birmingham New Orleans
Cleveland, Ohio	41	
Columbus, Ohio	41	
Parkersburg, W. Va.	41	
Charleston, W. Va.	41	
Norfolk, Va.	24	24
Knoxville, Tenn.		24
Augusta, Pa.		22

SECTION 15

Between New Iberia, La.

And	Via Twin Cities Baton Rouge New Orleans	Cairo St. Louis Baton Rouge New Orleans	Iowa Ports[1] Baton Rouge New Orleans	Peoria Baton Rouge New Orleans
Fargo, N. Dak.	46	35		
Rhinelander, Wis.	44	38		
Mason City, Iowa		34	34	
Milwaukee, Wis.	44	38		

And	Via Cincinnati Baton Rouge		Evansville Baton Rouge	
South Bend, Ind.	43	39	39	43
Grand Rapids, Mich.	43	39	39	43
Saginaw, Mich.	43	39	39	43
Detroit, Mich.	43			
Cleveland, Ohio	43			
Columbus, Ohio	43			
Parkersburg, W. Va.	43			
Charleston, W. Va.	43			
Norfolk, Va.	43			
Cheyenne, Wyo.		27		
Omaha, Nebr.		33		
Chillicothe, Mo.		34		
Decatur, Ill.		39	39	
Indianapolis, Ind.		35	35	
Bismarck, Mo.		35		

SECTION 15 (Continued)

And	Via Cairo Baton Rouge New Orleans	Memphis Baton Rouge New Orleans	Greenville Baton Rouge
Centralia, Ill.	38		
Joplin, Mo.		24	
Hopkinsville, Ky.		28	
Corinth, Miss.		19	
Clarksdale, Miss.			13

[fol. 646]

SECTION 16

Between Biloxi, Miss.

And	Via Twin Cities New Orleans	St. Louis Cairo New Orleans	Iowa Ports [1] New Orleans	Peoria New Orleans
Fargo, N. Dak.	37	28		
Rhinelander, Wis.	35	24		
Mason City, Iowa		30	35	

	Via Cincinnati New Orleans		Evansville New Orleans	
Milwaukee, Wis.		23	23	31
South Bend, Ind.	26	19	19	26
Grand Rapids, Mich.	26	19	19	26
Saginaw, Mich.	26	19	19	26
Cleveland, Ohio	26			
Detroit, Mich.	26			
Columbus, Ohio	26			
Charleston, W. Va.	26			
Parkersburg, W. Va.	26			
Cheyenne, Wyo.		28		
Omaha, Nebr.		29		
Chillicothe, Mo.		31		
Decatur, Ill.		23	23	
Indianapolis, Ind.		23	23	
Centralia, Ill.		23		

	Via Memphis New Orleans	Mobile Port Birmingham
Hopkinsville, Ky.	19	
Knoxville, Tenn.		22

SECTION 17

Between Salina, Kansas

And	Via Kansas City St. Louis	Kansas City Cairo
Atlanta, Ga.	18	
Columbus, Ga.		24

SECTION 18

Between Cheyenne, Wyo.

And	Via Kansas City St. Louis	Kansas City Cairo
Atlanta, Ga.	15	
Columbus, Ga.		20

[fols. 647–649]

SECTION 19

Between Omaha, Nebr.

And	Via Kansas City St. Louis	Kansas City Cairo	Kansas City Memphis
Atlanta, Ga.	[1]7		
Columbus, Ga.		22	
Meridian, Miss.			22

	Via Kansas City Vicksburg	Kansas City New Orleans
Brookhaven, Miss.	28	
Biloxi, Miss.		26

SECTION 20

Between Denver, Colo.

And	Via Kansas City St. Louis
Cincinnati, Ohio	22

Notes

[1] Dubuque, Clinton, Davenport (including Rock Island, Ill.) and Burlington.

[2] This differential is not proposed for application to rates to and from points in Oklahoma or Kansas.

[3] This differential is not proposed for application to rates to and from points in Michigan.

[4] This differential is proposed for application to rates between points in Wisconsin and Arkansas only.

[5] This differential is not proposed for application to rates to and from points east of Meridian, Miss.

[fol. 650] BEFORE THE INTERSTATE COMMERCE COMMISSION

Rail and Barge Joint Rates and Consolidated Proceedings

Docket No. 26712 & 13290, 18406, 19017, 19480, 26679, 26680, 26681

I & S 4032, I & S 4060 & I & S 4082

Transcript of Oral Argument

Hearing Room "B"
Interstate Commerce Commission,
Washington, D. C.,
March 10, 1948.

The above-entitled proceedings came on for oral argument pursuant to notice, at 10 o'clock a. m. before the Commission.

Present:

Chairman Lee (presiding) and Commissioners Aitchison, Mahaffie, Miller, Splawn, Rogers, Alldredge, Barnard and Mitchell.

APPEARANCES:

Harry C. Ames, 238 Transportation Bldg., Washington, D. C., appearing for the Mississippi Valley Barge Line Company.

Louis A. Schwartz, 611 Gravier Street, New Orleans, La., appearing for the New Orleans Traffic & Transportation Bureau, and the Memphis Freight Bureau.

Harold E. Spencer, 135 East 11th Place, Chicago 5, Ill., appearing for the Rail Carriers.

Nuel D. Belnap, 2106 Field Bldg., Chicago 3, Ill., appearing for Inland Waterways Corporation, operating Federal Barge Lines.

Herman Mueller, 1700 City Hall, St. Paul, Minnesota, appearing for Mississippi Valley Association.

[fols. 651-652] C. R. Hillyer, 135 So. LaSalle Street, Chicago 3, Ill., appearing for Savannah Sugar Refining Corporation.

Frederick E. Brown, 743 Investment Bldg., Washington, D. C., appearing for American Barge Line Company.

Herschel A. Hollopeter, 143 No. Meridian St., Indianapolis, Ind., appearing for Mead-Johnson Terminal Corp.

Ernest Porter, State House, Des Moines 19, Iowa, appearing for Iowa State Commerce Commission and the State of Iowa.

Frank P. Aughnay, State Capitol, Bismarck, North Dakota, appearing for Public Service Commission of North Dakota, Fargo Chamber of Commerce and Minor Assn. of Commerce.

W. M. Dyer, 1019 Beacon Bldg., Wichita, Kansas, appearing for Wichita Chamber of Commerce.

Wm. A. Disque, 70 Rust Bldg., Washington, D. C., appearing for Galveston Chamber of Commerce and Houston Port & Traffic Bureau.

S. J. Wettrick, Arctic Bldg., Seattle 4, Washington, appearing as Amicus Curiae.

[fol. 653] PROCEEDINGS

Chairman Lee: The Commission will now hear argument in docket 26712, Rail and Barge Joint Rates and Consolidated Proceedings.

Mr. Belnap:

ORAL ARGUMENT OF NUEL D. BELNAP

Mr. Belnap: If your Honors please, I would like to reserve thirty minutes of my time for rebuttal.

I speak in this case on behalf of the Inland Waterways Corporation, operating the Federal Barge Lines. It is a common carrier by water whose services extend on the Mississippi River and its tributaries from New Orleans on the south to Omaha and the Missouri River, the Twin Cities on the Mississippi River; Chicago on the Illinois River on the north.

This barge service also extends from New Orleans by way of Mobile and up the Warrior River Section to Port Bingham Alabama. It maintains a full structure of rates on classes and commodities between its ports on all traffic except perishables and livestock. It participates in an extensive structure of joint rates with rail carriers on a differential basis which correspond generally speaking to the differentials reflected in its port-to-port adjustments.

Commissioner Acheson: Does it handle less-than-carload traffic?

[fol. 654] Mr. Belnap: It handles less than carload traffic as well.

The joint rates cover generally speaking, southern territory, central freight association territory, Western Trunk Line and Southwestern territories.

The case which is here on argument is a consolidated proceeding heard on a common record. There are four common complaints of Federal Barge Lines which have had decisions previously issued which are set here for further hearing. They go back to the War Department case No. 13290 in which the first report was in 77 ICC 317. In these formal complaints Federal Barge Lines seek a structure of differential joint rates via through routes in connection with rail carriers.

There are three formal complaints by railroads which assail as unlawful the joint rate structure established in connection with the three respondent barge lines, those being Federal, the Mississippi Valley Barge Line and the American Barge Line.

All of them have joint rates prescribed by this Commission under the Denison Act in Ex Parte 96. The railroads assail those as unlawful.

In addition, we have your general complaint under title No. —, which was instituted by your order in October, 1934.

There have been very extensive hearings in these cases.

[fol. 655] Hearings were held beginning in 1935 through 1938, eleven different hearings. The record then ran to about 15,000 pages.

263 witnesses testified. A large part of that evidence related to operating expense data both for rail lines and for the Federal Barge Lines.

That data was referred to Your Honors' cost section. No report was issued at the conclusion of those hearings although the case was completely briefed.

The cost data was referred to your cost section for a report. The cost section issued a report in 1941 and a supplemental report in May, 1942.

The case was then re-heard primarily in respect to the cost data. It was again briefed.

After that came a proposed report, exceptions and reply exceptions, and we are finally here to orally argue the case.

Before I tell you about the issues of the proposed report, it perhaps would be helpful if I give you a history of the background. How the Barge Lines came into being.

The operations presently conducted by Federal were started during World War I by the director general of railroads in part by reason of the recommendation of this Commission that such operations be instituted.

In 1920 the operations were transferred to the Secretary [fol. 656] of War.

At that time the barge service extended only to St. Louis on the north.

The subsequent extensions to Omaha, the Twin Cities and Chicago came later, most of it subsequent to 1930.

In connection with initial operations the Director General established, and the Secretary of War expan-ed a system of port-to-port differential rates as well as joint rates with railroads. The differential rates were made 20 per cent lower than the corresponding all-rail rates between the ports. That differential was founded on the premise that it required at least that much of a differential to attract traffic to the interior service of the barge line.

It also rested on the premise that the barge costs of transportation were less than the all-rail costs.

Then and now, however, the matter of rail costs was treated as reflected by the price which the rail lines charge for their service. No attempt was made in connection with these barge operations to determine what the operating costs were of railroads any more than any water-line carrier has ever attempted to fix rates in terms of the operating costs of his competitors.

The thing that was looked to in determining what the rate might be on a differential basis was the rate, the price that the rail lines charged for corresponding service.

[fol. 657] That 20 per cent differential was extended into the interior in the same amount in cents per 100 pounds as applied at the ports. That was done under the theory that it was appropriate and in the public interest to extend the benefits of these cheaper barge rates to the interior communities to the same extent that the benefit of those rates was extended to the ports.

It also rested on another proposition. The service beyond the ports as a point of interchange in reaching an interior

point is the same whether it comes to that port by rail or by barge.

So that whatever might be the addition which the rail lines added for their rate up to the ports was likewise added in making the through rates in connection with the barge service.

The initial joint rate structure was extremely limited. It extended only to the territory of the states on each side of the Mississippi, from St. Louis to New Orleans.

Earlier in the '30's, the Secretary of War filed his complaint under 13290 which I mentioned awhile ago seeking an extension of the joint rate structure. The Commission's report is found in 77 ICC 317. It was written by Commissioner Eastman for the entire Commission.

No order was issued in connection with that report, but general lines were laid down for guidance of the carriers [fol. 658] in extending the joint rate structure. Among the limits were certain limits on circuity.

That is to say, the report found that no new route and differential rate would appear to be justified if the circuity by the interchange as measured by short mileage exceeded 40 per cent.

Commissioner Miller: There was a hearing in that matter?

Mr. Belnap: There was a very complete hearing in 13290. That was the original war department complaint.

Commissioner Miller: The original report of Commissioner Eastman was founded on that hearing?

Mr. Belnap: The report in 77 ICC 317 was founded on evidence taken at former hearings, as well as subsequent reports in that hearing.

The report provided that if the rail mileage in the joint route exceeded 75 per cent of the short line mileage to destination the Commission would not recommend the establishment of 20 per cent differentials.

Commissioner Aitcheson: Was that hearing after the Supreme Court's action?

Mr. Belnap: The Denison Act did not come along until later. This was not a Denison Act proceeding.

Commissioner Aitcheson: All right.

[fol. 659] Commissioner Miller: I was thinking of the Denison Act.

Mr. Belnap: That report provided a great deal of help

and encouragement. Practical problem was getting the divisions. Once the divisions were established the rail lines and barge lines found it easier to establish differential rates of 20 per cent basis extended into the Interior.

I might say at that time the railroads, many of them cooperated. They did not seek to hew precisely to the line of the Commission's recommendation. If it looked workable and satisfactory to extend the differential adjustment beyond those limits many railroads did so.

And that has been referred to in this case as the voluntary adjustment.

There were some railroads, however, who declined—utterly declined—to have any part with a joint arrangement with barge lines. The shipper interests went to Congress and secured the passage of the Denison Act in 1928.

That was an act which provided that upon application of a barge line this commission should issue a certificate of public convenience and necessity and then without hearing should lay down an order establishing the through routes and joint differential rates, and if need be, should fix different divisions.

Federal made an application under that Act, in ex parte [fol. 660] 96. The others made application in 99, and 102.

The Commission issued a report without a hearing. It is found in Volume 153 as far as Federal's Ex Parte 96 proceedings are concerned. In that the Commission laid down a formula since known as the Ex Parte 96 formula.

It found that unless the railroads and barge lines agreed, through routes and differential rates should be established within certain limited—within some certain limits to be performed by this mathematical process required under the formula.

I shall not describe the formula in its entire detail. I shall illustrate it by barge rail rates which are referred to in this report as 2-way rates. It has two horns. The rates must comply with both requirements. As to circuity, if the circuity does not exceed 20 per cent, the differential is to be a 20 per cent differential. If it is between 20 and 40, it is to be a 10 per cent differential.

Over 40 no differential.

On the relative service of the formula it provides that if the miles of haul over the connecting rail line do not exceed 66⅔rds of the short-line distance via rail from origin to

destination the differential shall be 20 per cent; if between 66⅔ and 75 per cent, the differential shall be 10 per cent. Over 75 no differential.

The Denison Act and the proceedings thereunder provided [fol. 661] a land mark in the relations of these barge lines with their rail connections. The enactment of that legislation and the proceedings thereunder solidified the railroads opposition to barge service.

From 1929 to date there has not been a single instance in which any railroad has willingly cooperated with any barge-line respondent in this case in the establishment of any rate, any route, any rule, privilege or practice. They have required that every piece of tariff matter be handled through their bureaus. No railroad will deal with a barge line individually as they deal with one railroad with another. They insist on bureau handling. They insist on the strict letter of the Ex Parte 96 formula, no matter how absurd may be the results.

I would like to illustrate the absurdity of the results produced by that formula. By one example. From St. Louis and Chicago on the north via Vicksburg we have joint rates which extend into the southwestern territory. There is a line of railroad extending directly west from Vicksburg at right angles with the river. On that line we have two rates, part of them routed by Vicksburg, a part via Helena and a part via Memphis. Some of them are 20 per cent differentials by each of these ports. Others are ten per cent of the differential by these same ports.

And it is a hop, skip and jump mess of rates down that [fol. 662] single line of railroad, when the logical thing to do, whatever the differential, would be to provide a routing via Vicksburg and have a uniform line of rates down that railroad.

It requires literally hundreds of thousands of calculations to work out any particular rate adjustment under your Ex Parte 96 formula. In fact, when you revised the southwestern class of rate structure in your supplemental report in that case, it took Federal Barge Lines four years of committee handling before we could secure a corresponding revision in the Barge-Rail adjustment.

Before that we were forced to sit there for an appreciable length of time with Barge rates higher in many instances than the All-Rail rates you have prescribed.

Furthermore, the voluntary adjustment is gone. The railroads in this case acting collectively in every instance have insisted we give up the old voluntary adjustment as a price—mind you, a price of obtaining ordinary readjustment of rates when you require revision in all-rail rates.

That is the background, if you please, of the rate structure involved in this case.

I now come to the instant proceeding. I shall first tell you the position of the parties, what was found in the Examiner's report, and the exceptions we have taken thereto.

Federal's position in this proceeding is to support a [fol. 663] continuation of the general scheme of differential routes and rates now in effect. It asks some modification in the modification of the differentials and the material zones where the differentials apply.

Those are asked, consistent, logical adjustments. They are asked in order that we may have one that is workable and practical.

We also ask in this proceeding that you require rail carriers, as to rules and practices and regulations, such as transit privileges, to accord us fair equal treatment with their rail connections. A treatment which they will not and have not given us willingly and have done so only when required by your orders.

Now, the basis for our support of the present structure and the modification extensions we ask in it is this: We show on the evidence in this case that Federal can give its connecting railroads, who are the only respondents directly involved in the issues, the same divisions that they would receive out of the corresponding all-rail adjustment; that Federal can absorb the differential out of its remaining portion of the differential rates and cover its cost including a fair return on the investment in facilities devoted to the service.

That is the basis of our case. It is simple. And it is the entire basis of our case, except this: We show that [fol. 664] unless differentials are provided in connection with these barge routes and rates, no traffic will move over them.

We made a test during the course of this hearing as to what happened in connection with Ex Parte in 96 rates,

where they are in part 20 per cent and in part 10 per cent. We analyzed the traffic moving over a six months' period into the southwest under those rates. It was less than ten per cent of that total traffic moving on joint rates which were attracted by the ten per cent differentials. Although territorially they covered a territory about as extensive as the 20 per cent differentials.

It takes the differentials of the measure we seek in this case to attract the traffic to the route.

Now, the railroad's position as opposed to ours is a purely negative one. In all of these long fourteen years of hearings and briefs, you cannot find a single constructive suggestion from a railroad as to what you should do in this case. They seek one thing only. They seek to destroy it. They urge that you should require the cancellation of every through route and differential rate now in effect. That is where they start in this case and that is where they stop. They offer you nothing else.

They base that position on a claim which we deny is true, and their claim is that their operating expenses, taxes, rents and return on investment as apportioned by statistical [fol. 665] and arithmetical processes to this same traffic is less than if you make a similar apportionment in respect to barge and rail costs over the barge-rail routes.

The Examiner's report reflects their claim. He makes no finding on their claim of a lesser cost. In his report the Examiner refers to this analysis that Your Honor's cost section made of the cost data, and states as a fact, that that analysis and report "produces figures".

That is his phrase. It "produces figures" which show that the all-rail costs are less than the barge costs. As I said——

Commissioner Miller: Less than the rail-barge costs?

Mr. Belnap: All-rail costs are less than the rail-barge costs. That is what is produced.

Commissioner Miller: You said barge costs.

Mr. Belnap: Well, it comes down to about that point, sir, because on the rail-barge side of the equation you are adding in costs for a rail movement which are taken from the same units as added in on the all-rail side of the equation. So the claim really boils down to this: The railroad claim that it costs less to transport goods by rail than it cost by barge.

Commissioner Miller: Well, I do not understand it that way. It is less than by rail-barge, because of the cost of transfer being such an item.

[fol. 666] Mr. Belnap: Well, I will accept it as you state it. The transfer cost must also be reflected, of course. The finding by the cost section, not by the Examiner, offers the Commission nothing by way of a finding on the part of the Examiner or independent judgment on that point. We have no finding of the Examiner to except to there, but we do vigorously object to this commissi- even giving room to this analysis by the cost section.

Commr. Alldredge: Can you give us your own analysis?

Mr. Belnap: I have done it very extensively in my brief in reply to the exceptions. As far as the reliability of the study, it takes considerable detail to discuss it. Time would not permit of my discussing the detail of it in my opening statement, except that my opponent on the railroad side may rely on that cost study and I wish to give you some reasons why it is unreliable.

Commr. Alldredge: You are not relying on it?

Mr. Belnap: I am not, sir.

Commr. Alldredge: Did the water carriers have a cost study?

Mr. Belnap: We had a very extensive study of barge costs, because we know that is a significant item in this case. It is a study that took over six months' traffic and determined the precise costs, commodity by commodity, terminal by terminal, handling by handling, each specific [fol. 667] part of the river separately, and direction by direction. We did not develop that by a statistical method of applying factors to each loading. We did it by following the traffic through and determining what it cost.

Commissioner Alldredge: Did you not have to make any allocations that way?

Mr. Belnap: Very few, sir. On a barge you have a tugboat that has several barges in tow. You have to allocate barge by barge according to weight but actual plans were made of each barge transported, the actual space occupied by each ton of freight was measured, and those were allocations based on a particular use of a particular tugboat, not all in one lump and distributed on the grand average theory.

Commr. Alldredge: Did the barges have more than one commodity in them?

Mr. Belnap: Yes, sir, and each commodity was measured separately—the space occupied for that individual movement.

Commr. Alldredge: You reduced it to space?

Mr. Belnap: Part of it. It is quite a long involved formula.

Commr. Alldredge: Well, just tell me where you included that?

Mr. Belnap: In our 1939 brief you will find an index that refers to the Fletcher cost study. That describes our cost study in detail. It is a gray colored brief.

[fol. 668] Commr. Alldredge: 1939?

Mr. Belnap: 1939 brief.

Commr. Alldredge: Are you asking us to render a decision now on 1939?

Mr. Belnap: In so far as the matters relate to that cost study that are still relevant in this proceeding, I am, sir.

Commr. Alldredge: Would the 1939 cost be relative now?

Mr. Belnap: The cost study was a 1936 study, if you want to know the awful truth.

Commr. Mitchell: What value would that be to us now?

Mr. Belnap: As a cost study for present-day costs, perhaps none. As a method of its use and a method of arriving at differential routes and rates which were fully justified as of the time when this Commission conducted hearings, it points to a method of arriving at them.

Commr. Alldredge: Could you tell me this, as one general statement, whether or not your analysis of your own cost study showed that greater differentials than those now prevailing are justified?

Mr. Belnap: No, sir. Generally speaking we came out with about the same average differentials. We made modifications of them in the interest of consistent, logical workable adjustment.

Commr. Alldredge: Then you feel that the cost studies which the barge lines put in to the record justified at the [fol. 669] time the differentials that were in existence?

Mr. Belnap: Exactly, sir. We prove it—based, however, on our approach and theory of the case, which is—and this must be borne in mind—that our costs considered we can pay our connecting rail line out of the differential rate the revenues to which it would be reasonably entitled out of a corresponding all-rail rate, and the balance of the rate—

our division—is sufficient to cover our costs and a fair return on our investment. We proved it.

Commr. Alldredge: That is the theory on which——

Mr. Belnap: That is the theory on which any water-line, whether it be federal or a steamer operating coastwise, necessarily makes its rate. Port-to-port rates are necessarily made under the same theory.

Our own costs provide the floor, and you fix a rate enough lower than the all-rail rate to attract traffic to your service.

Commr. Alldredge: In some cases, has it not been recognized that the quality of the service rendered by the water lines justified on the principle of what the service is worth, lower charges than by rail?

Mr. Belnap: The inferiority of the service has always been recognized in these barge-line cases as significant in this respect. Unless you have a differential you will not get any business.

Commr. Alldredge: Well, carrying it out to its ultimate [fol. 670] conclusion, it would mean, would it not, that the water service, is not as valuable to the shipper as rail?

Mr. Belnap; That is true. He will not pay as much for it. From his standpoint it is not as valuable as rail service.

Commr. Alldredge: Well, you have gone back to Federal control and the barge lines were put in at the suggestion of the Director General as a means of affording additional transportation. Why was it not worth just as much then as rail transportation?

Mr. Belnap: Because no shipper will use barge service if he has to pay as much as all-rail rates.

Commr. Aitcheson: He would not ship?

Mr. Belnap: He would not ship.

Commr. Aitcheson: He would wait until the war was over and the rails could carry his traffic?

Mr. Belnap: If you had the position where a man could not get a railroad car furnished to him——

Commr. Aitcheson: That is what the situation was at the time the barge line service was recommended by the director general.

Mr. Belnap: Then maybe they made a mistake and should have charged all the traffic would bear. But they would not do it.

Commr. Aitcheson: Has not that also been the case in the [fol. 671] case of, or the present situation of car shortage?

Mr. Belnap: As a fact I do not know that such a situation existed, Where the shipper could not get a car and therefore came to the barge lines and said, "I will pay you as much as if the railroads furnished me a car."

I would like to say a word or two in a very general way about how we arrived at the differentials we proposed, which are accepted in part by the Examiner, and where the Examiner did not agree with us entirely we have in large part accepted his recommendation only when it was necessary to make some minor modifications in his recommended differentials.

I might say that the Examiner recommends that you discard the Ex Parte 96 formula. Nobody accepts that—no one excepts to that recommendation.

Nobody said a good word for the Ex Parte 96 formula throughout the proceedings; chiefly due to the difficulty of working it out.

The Examiner recommends the workable satisfactory basis of interior zones for differentials, which we accept entirely. We take no exception to his zones. It is only as to certain measures with very few differentials.

Now, the Examiner adopted in his report our general approach to this case. He found by his own processes that if the barge lines can afford to obtain a differential rate, [fol. 672] absorb the differential out of their revenue, give the connections the same revenue they would receive if they were participating in the traffic on an all-rate route, that those were reasonable differentials under the Act.

We agree with that view of the case.

We worked out the differentials we proposed. On that basis we proposed a very detailed and complicated set of calculations to do it because we studied an entire year's traffic. We took the 1933 joint rate traffic as reflecting a composition of the ordinary type of traffic handled by barge-rail routes. We determined the revenue which that traffic would have yielded the railroads if transported at 1936 rates. We determined the costs which should be applied thereto for the barge portion of the haul. We took the all-rail revenues and we found out how much should be apportioned to the connecting rail lines. We found that when you aggregated the barge costs on this entire year's joint traffic with the proper divisions of the rail lines on the same traffic, that the aggregate was less than the revenue produced by the all-rail rates on the same traffic.

From that study a scheme of scales were produced so that we might test point-to-point movements via every interchange point which we serve. The scales reflected, of course, the average of the joint traffic, both from the [fol. 673] standpoint of barge cost, from the standpoint of the rail revenues, from the standpoint of the rail divisions.

By applying those scales produced from that study the Federal Barge lines people determined literally thousands of point-to-point differentials for the average of all of this traffic which were expressed in percentages. They were not uniform.

Every point would work out a little differently. We used first class for convenience and applied this percentage to first-class and obtained the key point differential, and the trend of those differentials through zones were then used as a basis for a single differential to be applied through an extensive interior zone. Now that is very briefly the general process we went through to secure the differentials which we finally proposed in this case. The detail of that method is explained at pages 209 to 290 of our 1939 brief.

Commr. Alldredge: I understand that grain rates are not involved, is that right?

Mr. Belnap: The grain rates by the Federal Barge lines are commonly handled on port-to-port rates. There is nothing involved here as to joint rates on bulk grain.

Commr. Rogers: Why is that?

Mr. Belnap: Our ports are usually rate-break points such as they are in the railroad structure. Memphis, St. Louis, [fol. 674] Chicago, Kansas City, those are the big grain ports, and all the Federal Barge Lines seek as to grain is that you give us equal treatment with the railroads leading inward from those points and we will make our rates the same way as the railroads make them on rate-break combinations.

Now, I want to say something about the opposing view of the railroads. They say our method is wrong. You appreciate in our proposal and our method we pay no attention whatsoever to what it costs to handle the traffic by the paralleling and competing route.

We consider that has no place in this case. The railroads we consider to be the respondent with whom we must deal in our connecting rail line.

Obviously, that is the only line of railroad in which the

order we seek in this case would run. But the railroads say contrary to the view of our matter, that we are not entitled to any differential at all unless it appears that the barge costs on the composition of traffic which we handle, added to the costs of our connecting rail lines, are less than the costs via the direct rail route through from first origin to final destination. And the costs for the railroads which they set up to make this measurement are determined from annual report expense data for all traffic.

Now, that method of testing, the reasonable differentials has been referred to in this case as the direct cost-to-cost [fol. 675] comparison method.

We say that the direct cost-to-cost comparison method is wrong in principle, and in explaining why it is wrong in principle I am going to assume for the time being—although I otherwise deny it—that it is practicable to consider, to determine the actual costs by railroads on particular point-to-point movements of particular commodities. I am going to assume that that can be done.

And for the time being I am going to assume that it was done reliably in this case.

I might say that in our exceptions we assert that neither of these assumptions which I am indulging for the time being are sound. We undertook to show in our exceptions that it is impossible, no matter how excellent the method, to use annual report expense data for the average of all traffic and determine with any reasonable degree of approximation what is the true cost of transportation of a particular commodity from a particular origin to a particular destination.

Commr. Alldredge: You say you have established that?

Mr. Belnap: We argue it, sir. We think we have proved it. You are going to have to be the say about that, however. You are going to have to be the final judge of that. We also think we have proved by what the analysis provided by our exceptions shows, that the method and basic data and cost [fol. 676] section used to erect these railroad unit costs is unreliable, unsound, and the results are utterly worthless.

But for the time being, I am going to assume to the contrary.

Let me put the railroads' proposition to you in simple form. It is this: They say that we have found out now that the cost to be apportioned to a particular move is one dollar

if it moves by railroad. Then we find that if it moves rail and barge it costs also one dollar.

In that situation the railroads say there should be no differential, that it is unlawful to have a differential and they say that even though it appears that they are charging $1.50 for the all-rail service.

Now, mind you, these representative units of cost with which I am dealing always include taxes, rents and return on investment. Those amounts are apportioned on top of operating costs to cover those levels.

Commr. Miller: If they put in their rates on a cost basis, then they would get the traffic.

Mr. Belnap: Yes, sure.

Commr. Miller: And you would lose it.

Mr. Belnap: We could not get the traffic at all.

If they make it on the basis that their statistics would appropriately apportion costs to this item, they cannot say [fol. 677] that is the cost from the standpoint of constant expenses and return on investment.

All they can say is if we apportion these overheads and accounts uniformly that amount will show up as apportioned to this particular item.

Commr. Miller: But on your assumption the rate is fifty per cent more than the cost.

Mr. Belnap: My assumption is the truth. The record shows it. That is going to be developed here. Mr. Ames is going to deal with it in part. They spread these costs and say these are our return on investment and the rates have no relation to what they claim as costs.

Commr. Miller: That is what I say. If they made the rate $1 then of course, you could not get any of the business—if they made the rate $1 instead of $1.50.

Mr. Belnap: That is right, but the man who fixes the price of this service has apportioned cost, as we view it, in a practical way. He has done it realistically. He has said that this traffic should pay us $1.50. He has said that will cover the operating expenses, the taxes, the rents and the return on investment. And when the rate-maker has had his say, as he has had it in the illustration I have given you, we have a practical realistic apportionment of these costs.

[fol. 678] I say for the purposes of this case you can take the railroad rates as reflecting the costs of the service.

Commr. Aitchison: Does the record show that any rail-

road man ever made any rate on the basis you have described?

Mr. Belnap: His mental processes, no, sir. But that is necessarily the effect of his rate-making, all traffic considered in the aggregate or individual movements.

It is his judgment as to what that traffic should contribute to cover expenses, overhead items and return on investment.

Now, coming back to this $1, and this $1.50 illustration, we say that what the railroad claims is not required under the statute. We think it is clearly contrary to the Congressional intent, and we think it is not in the public interest.

On this point of the rail costs and the barge costs, and how they relate to the revenues, there is a very significant table on page 15 of the Examiner's report.

Now, if railroad costs have any significance, that is, the all-rail costs have any significance or relevance in this case, and if you are going to accept them in any part as reliable, we say that the table on page 15 of the Examiner's report provides the only use that can be made of them.

In that table the Examiner takes up the barge-rail traffic involved in the studies which the railroads presented in [fol. 679] this case.

One is called the Lyrla study and the other is called the Vivian study. The Examiner's table shows the relation of the barge-rail differential rates as divided between the connecting rail lines and the barge line, shows the connection of that rate as so divided to the cost which the cost section produces in this case.

And incidentally, that cost in the lower half of that table includes a 4 per cent return on investment as well as all over-head, taxes and rents.

Now, the second half of that table which shows it on that basis indicates that for the Lyrla study, the barge rail rates give the railroads 25 per cent more than the costs which apportion to the connecting rail lines.

It gives the barge lines 1 per cent more for their costs plus a return on investment, and for a through movement the revenues are 12 per cent in excess of the apportioned costs.

On the Vivian study, it shows on the rail leg of the journey revenues of 5 per cent in excess of the apportioned rail costs. On the barge leg of the journey it shows revenues 14 per cent in excess of the barge costs. And for the through movement it shows revenues produced by differen-

tial rates which exceed by 9 per cent the apportioned per — the apportioned costs.

Now, to the best of my recollection the railroads took [fol. 680] no exception to the finding there made by the Examiner, which incidentally is his own finding produced by himself from data of record. They could hardly except to the units which the Examiner used—the cost units—because they are the cost units on which the railroads rely. And the rate data is simply based on the tariff as to what the differential rates actually were on that study of traffic was.

Now, as I said in first calling your attention to this table, if all-rail costs have any significance, any relevance at all in this proceeding, that relevance is exhausted when you get through with that table. You need look no further to find full and complete justification under the statute for the differential rate adjustments.

Another reason why we deem the direct cost-to-cost comparison as useless in this case has been touched upon before by a question from the bench and that is that the rail-rates themselves are not related to the costs that these railroad witnesses in the Cost Section produce as the costs. They have no relation whatsoever to those costs.

Comm'r. Alldredge: Do you mean that they are not directly related?

Mr. Belnap: On the individual commodities and on the point-to-point movements. And your Honors must keep this in mind, in treating of this case, that the barge traffic handled with railroads has no similarity to the composition [fol. 681] of the all-rail traffic.

The commodities which we attract, which are in the position to move by these barge-rail routes, percentage-wise or particular commodities, are entirely dissimilar. If you look at the commodities that parallel us or operate in the same territory.

So necessarily, when you are going to talk about costs from any standpoint you have to have costs that pertain to this particular composition of traffic involved in this case.

As I say, the rail rates are not in issue — the first instance. There is nothing you can do in this case about rail rates, except that they must necessarily be used for practical reasons as the base for the differential rates to be prescribed.

But those rates themselves are not in issue and no order you can make in this proceeding can prevent them making a change in those rates if they decide to do so. That is to say, if they want to take the $1.50 rate down to $1, Mr. Miller, there is nothing that we can ask in this case that will prevent them from doing that.

Commr. Aitcheson: Your position is substantially different to what the transcontinental Rail Lines are faced with in the Intercoastal case.

Mr. Belnap: I do not know what their position is, sir.

Commr. Aitcheson: As I understand it, they feel that their transcontinental rates are too low and they want the [fol. 682] commission to increase them.

Mr. Belnap: You mean the water carriers——

Commr. Aitcheson: Yes.

Mr. Belnap: I am not familiar with that, sir.

Commr. Aitcheson: You made some statements awhile — about water-transportation rates that are all-inclusive. That is the reason I asked you this question.

Mr. Belnap: In this case I speak only on behalf of Inland Water Ways Corporation.

Commr. Aitcheson: You made some statements about water rights wide enough to include domestic and foreign commerce, and——

Mr. Belnap: If I did, I over-extended myself. I should be talking about water transportation on these streams. The coastwise system in so far as making the rates is comparable with the rate-making problem in the inland streams.

Commr. Aitcheson: Well, with respect to intercoastal, their position is that their rates are too low and they want them raised.

Mr. Belnap: I am making no such request in this case.

Commr. Miller: That is not in the case?

Mr. Belnap: Not to the best of my knowledge.

Commr. Aitcheson: Well, I was just trying to find out whether the water carriers are all taking the same position.

Mr. Belnap: There is no issue in this case as to the level [fol. 683] of the all-rail rates, so there is nothing for me to discuss in connection with it.

We believe that there is a striking similarity between the issues and the problem involved in this case, and what was involved before the Supreme Court in the Mechling case which was decided March 31, a year ago.

That case, as Your Honors will recall, involved principally grain from Illinois moving via Chicago to the east. The rail rates were single-factor joint through rates. Mechling in that case asked the Commission to require the eastern lines to maintain on traffic which he brought to Chicago by barge separately established proportions no higher than the divisions the eastern lines demanded and received out of the one factor joint through rates.

In effect, that is our case. We are willing to give the rail carriers the same division, and then we want to go our own way after that.

In the Mechling case when it was before the Commission Your Honors fixed a separately established proportion on trunk line ex-barge grain 3-cents higher than the railroad division. And your report indicates you did that upon the theory that such a separately established rate when added to the compensatory barge rate inbound would provide a reasonable and equitable through barge-rail rate. Your order founded on that premise was enjoined by the especially constituted district court at Chicago and that injunc-[fol. 684] tion was sustained in the Supreme Court.

The objective of the railroad in the Mechling case is precisely the same as the objective of the railroads in this case. I quote from the opinion of Mr. Justice Black from the Mechling decision:

"At the commission hearing to test the validity of the higher ex-barge grain rates, a railroad representative candidly stated that the purpose of the proposal was to"—and the Justice here quoted—" 'drive this business off the water and back onto the rails where it belongs.' "

That was the purpose of the eastern lines in the Mechling case, to destroy the barge service, to make it so it could not be used by shippers. While the railroad representatives here are not so candid, that is their objective.

In the decision of the Court in the Mechling case Mr. Justice Black reviewed the transportation policy declared by the statute, the provisions in Part I which forbid a rail line from discriminating against a connecting water line. He dealt with the appropriate sections in part I of the Act which relate to water rates and service, and then he said:

"The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates—" and mark you that, please, barge rates or barge-rail rates—"which do not

[fol. 685] preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely the provisions mean in this case, that the Chicago-to-the-East Railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same locality, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does the ex-rail or ex-lake grain.

And section 307 (d) authorizing the Commission to fix differentials as between through water-rail and through all-rail rates does not authorize the Commission to neutralize the effective provision—prohibitions of the other provisions which were strengthened in 1940 expressly to prevent a discrimination against water carriers.

"The basic error of the commission here is that it seemed to act on the assumption that the Congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers or cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that."

And later in the decision Mr. Justice Black said:

[fol. 686] "Nor is the Commission's order appointed by its conclusion that it is 'inequitable' for the barges to charge a much lower rate for the inbound grain haul than the competitive western railroads can afford to charge for the same haul, resulting in barge-rail rates lower than all-rail rates from the same localities. For this is no reason for authorizing a higher rate to eastern railroads which do not compete with the barges at all."

And I emphasize in this connection that the respondents with whom we ask joint rates as to the segments of the lines over which we ask the joint rates are not in competition with the barge line. Later Mr. Justice Black said:

"For Congress left the Commission no discretionary power to approve any type of rates which would reduce the inherent advantage of barge transportation in whole or in part."

Now in that case there was no comparison of rail costs with water costs to determine what was the inherent advantage. The evidence before this Commission on which you predicated the finding was evidence as to barge costs only. The barge costs supported the rate.

Commissioner Aitcheson: How did the Supreme Court find itself able to make a finding that there was an inherent advantage in barge transportation?

[fol. 687] Mr. Belnap: The cheap rates we charge. We can charge a cheap rate lower than the price of rail transportation and make a profit on it.

Commr. Aitcheson: Is that in the record?

Mr. Belnap: In the Mechling case, yes, sir.

Commr. Aitcheson: Did it make a profit?

Mr. Belnap: Yes, sir, it was shown in the Mechling record.

Commr. Splawn: Is it likewise shown on this record that the barge lines will make a profit at rates lower than the rail rates?

Mr. Belnap: It was shown as of the time we made our cost study—our rate proposals, sir.

Commr. Splawn: I suppose we cannot take any official notice of various arguments that have been made recently, can we?

Mr. Belnap: I am not certain how far your official notice goes. You do have stipulated in this record all of the annual reports of these barge carriers, and as far as Federal is concerned, that goes to the Secretary of Commerce as well as to this Commission. I have laid before you the annual report of the Inland Waterways Corporation which covers the year 1946 and the fiscal year ending June 30, 1947. I have slipped into that report a copy of H. R. 5318 [fol. 688] which is the bill now pending before the Congress for the purpose of liberalizing the provisions in the present Inland Waterways Corporation Act, which proposes a sale to private interests.

I have also had handed to you in connection with that the statement which Undersecretary William C. Foster of the Department of Commerce made in support of that bill. His statement, of course, is not evidence in this proceeding. It brings you down to date, however, on the program which the Department of Commerce, the Management of Federal, is

attempting to follow in so far as the sale of this line is concerned.

The annual report is evidence in this proceeding because it is hereby stipulation.

Commr. Splawn: I am just asking for information. You were in the Mechling case, as I recall, representing the same clients you represent here?

Mr. Belnap: I was representing Inland Waterways.

Commr. Splawn: You did not make the same record as to your client that Mechling made?

Mr. Belnap: We did not. We offered no cost data in that case at all.

Commr. Splawn: But you had a decision from the Supreme Court that was just as favorable to your client as it was to Mechling.

Mr. Belnap: Yes, sir.

Commr. Splawn: What is the bearing of that on this [fol. 689] proceeding? I think that is rather important.

Mr. Belnap: I think from the standpoint of this proceeding that the barge rate, the barge price, what we hold ourselves out to carry goods for, which is cheaper than the price put on it by the railroads is an inherent advantage of water transportation.

Commr. Aitcheson: Would you apply the reverse of that also,—that if the rail lines asked less than the water lines that that was an inherent advantage of the rail lines that should be preserved?

Mr. Belnap: That if they charge less——

Commr. Aitcheson: If they offer the transportation for less.

Mr. Belnap: I do not know how the point would arise.

Commr. Aitcheson: It might arise in the transcontinental cases and the inter-coastal case. It is not a moot question at all.

Mr Belnap: I am not representing inter-coastal. I have given it no thought at all, sir.

Commr. Aitcheson: It arises in some inland waterways cases.

Mr. Belnap: If the rail service is such that they can afford to charge less than the water lines charge——

Commr. Aitcheson: Could or do charge.

Mr. Belnap: Do charge, and make a profit on their busi- [fol. 690] ness on that basis, there is no claim on our part that they should be prevented from doing so.

Does that answer your question, sir?

Commr. Aitcheson: Very well. You brought the element of cost of service in in the one case which you did not in the other.

Mr. Belnap: In connection with that 1946 annual report, I want to call your attention to the fact that the Federal Barge Line lost, from the standpoint of operating expense and revenue standpoint alone, about $2,000,000 in fiscal '47. I think it is about 2½ million for the calendar year 1946.

There are many things that can be said as to that. That is where I am under a grave difficulty, because the record covers no period as to conditions encountered in the actual operation of this line subsequent to the year 1942. I have appended as an appendix to my reply exceptions, testimony taken before House committees on the matter. In that reply exceptions I make this suggestion to Your Honors: That if you cannot take official notice of the testimony offered by Congressional committees which pertain to the matter then I ask for a further hearing in this case so we may bring witnesses to the stand who will interpret and analyze this particular testimony I cite for you.

Standing alone it is meaningless. It is a figure.

To the extent that the record would permit, I developed in [fol. 691] my reply exceptions the peculiar and abnormal conditions which Federal has encountered beginning with the war years which have made its operations unprofitable.

Commr. Mitchell: Has Federal ever made money?

Mr. Belnap: Yes, sir.

Commr. Mitchell: What year?

Mr. Belnap: The earned surplus at the end of 1948 was about 2½ million dollars. The corporation started with no working capital at all. It started with the paid-in capital by the United States Government which was expended from time to time in the purchase of additional equipment. At the end of 1938 it had an earned surplus of around 2½ million dollars.

Commr. Mahaffie: Had it charged any depreciation up to that time?

Mr. Belnap: I think as of that period there had been about $7,000,000 of depreciation charged. The rate was not high enough. In this last report you will find copious footnotes to the Federal balance sheets to show that the balances have gone to a $7,000,000 loss. A large part of

that is as a result of the re-statement of investment value which the corporation took over, and a re-statement of the depreciation which the corporation took off prior to 1946.

Commr. Mahaffie: If that had been related back to the previous years would that have eliminated their surplus in [fol. 692] 1938?

Mr. Belnap: I do not know, sir. It would have made considerable inroads on it.

Commr. Aitcheson: Has there been any attempt to bring the record that has been made in the recent rate increase cases in here where some of the barge lines involved were asking for relief from us and made presentations showing the changed conditions?

Mr. Belnap: Only as I understand it from the statistical standpoint. They produced figures showing what their operating revenues and expenses were, but to the best of my knowledge nothing beyond that.

I would like very much to reserve the balance of my time for reply.

Commr. Mitchell: I assume you have lost money since 1938 mainly as a result of your increased labor costs?

Mr. Belnap: That has been true in a large part. The present equipment of the barge line with the exception of a few towboats acquired from Defense Plants limited, is ancient equipment and much past the period when it was accruing depreciation.

It is uneconomical and inefficient equipment and costs a lot to maintain it.

Commr. Mitchell: I believe you estimated that they expect to spend about $17,000,000 to bring it up to date.

[fol. 693] Mr. Belnap: There are two alternatives presented to Congress right now. One of them is that the Federal Government shall continue Federal Barge Lines and shall put in about $17,000,000 additional to rehabilitate the line, to give it modern, efficient and economical equipment and terminals.

That is one alternative.

The other alternative is to have a sale to private interests. Negotiations in that direction have been under way—at least informal negotiations. The House Bill which I passed up to you is one to design—it is designed to liberalize the conditions under which that sale can be made so that the Secretary of Commerce will be able to dispose of the property and at the same time assure its continuance.

Now, I do not even regard as existent a third alternative that the Congress will scrap this operation. There is that—you could call it a possibility. But I believe there is no room at all for Congress to take that step. I believe it will do one or the other of the two things I mentioned.

Commr. Alldredge: Would you have us take notice of testimony taken before the Congressional Committee, or grant you another hearing——

Mr. Belnap: So we can bring you down to date on the explanation of the operating deficit of the Federal Barge Lines which have reached their peak in 1946 when it was a [fol. 694] 2½ million dollar deficit.

Commr. Alldredge: Has not the Commission been criticized in that very testimony for delay in this case?

Mr. Belnap: I do not recall anybody's criticism, but maybe they did.

Commr. Alldredge: In the face of delay you still want a further delay?

Mr. Belnap: I want Your Honors to issue a complete and comprehensive order in this case which will dispose of all issues. I have explained to you that we can obtain no cooperation at all from rail lines except where you compel it. If you cannot give us an order on the present record, we ask you to permit us to make a record on which you can make an order.

Commr. Alldredge: I was referring to what you asked us to do. You want to give us testimony in the light of testimony given in committee hearings before Congress?

Mr. Belnap: I call your attention to that evidence for the purpose of showing that that is what we will show if you give us a further hearing. I suggest if you can take official notice——

Commr. Alldredge. I understood your request to be this: If we cannot take official notice of that testimony—I assume you mean take notice of it and use it in arriving at the decision in this hearing.

[fol. 695] Mr. Belnap: That is right.

Commr. Alldredge: Then you want us to give you another hearing.

Mr. Belnap: That is right.

Commr Splawn: Well, that is asking for another hearing, is it not?

Mr. Belnap: It——

Commr. Splawn: When the court construing the statutes hesitate themselves to look back to such testimony before Congressional committees, what would they think of our basing an important order on testimony before a committee?

Mr. Belnap: I doubt that they would like it, sir.

Commr. Aitcheson: Was there any opportunity for cross-examination of these witnesses before the Congressional Committee?

Mr. Belnap: Not that I know of, sir.

Commr. Aitcheson: Well, you know very well there was not because the rules of the House and Senate do not permit it.

Mr. Belnap: I have never happened to testify there, so I was not aware of that, sir.

Commr. Mitchell: With regard to this statement of Under-Secretary William C. Foster of the Department of Commerce, would this be the evidence to be considered in another hearing?

[fol. 696] Mr. Belnap: That is just in connection with the bill. I bring it to your attention so you may be apprised of what is pending before Congress at present.

Commr. Mitchell: You do not think his statement is very material, do you?

Mr. Belnap: Well, I think it is quite material that the Department of Commerce is trying to sell the Federal Barge line as a going institution, which the Congress said should be operated in the public interest. They have asked Congress to give them legislation which will enable them to transfer this line over to private purchaser——

Commr. Mitchell: That may be of interest to the Congress to have to decide that question, but that is not the question we have to decide here.

Mr. Belnap: I am now offering that to Your Honor as a question you have to decide. That is in the background of this case, that possible private purchase.

Commr. Mitchell: I do not see where it is material to this case at all.

Mr. Belnap: I am not offering it to prove——

Commr. Mahaffie: What you are asking is that we take official notice of the 78 pages at the end of your reply?

Mr. Belnap: I wish Your Honors would not say "official" notice, because I do not think you can. I offer that as the

character of evidence we would produce if Your Honors [fol. 697] find that this record is inadequate on which to make a final decision in this case.

Commr. Splawn: I understand your position, then.

Mr. Belnap: May I reserve the rest of my time, if Your Honors please.

Commr. Rogers: Can you say now whether you want a further hearing or not?

Mr. Belnap: I believe there is sufficient evidence in this record so that Your Honors can make a decision.

Commr. Rogers: It seems to me you ought to take a position one way or the other, as to whether you want a further hearing or do not want a further hearing, without putting it up to us to decide.

Commr. Aitcheson: You ought not to gamble on it.

Mr. Belnap: Well, there is nothing left for me but to gamble, sir.

I urge upon you that you have a record on which you can make a decision. There are people here who will argue that the record is stale and not a record on which you can make a decision.

Commr. Rogers: Then you are still asking for a further hearing?

Mr. Belnap: If Your Honors find that you cannot do anything on the record other than dismiss the case without prejudice, then let us proceed with the case and build a [fol. 698] record on which you can make a proper and complete decision. I do not know what you are going to do. If I may, I would like to reserve the rest of my time.

Commr. Mitchell: I think you should make a decision, not the Commission, as to whether or not you wish a further hearing.

Mr. Belnap: I urge upon you that with this record you have enough evidence to issue an order, the kind of order we seek.

Commr. Alldredge: I thought you urged us to take notice of some testimony before a Congressional committee, and if we could not do it, then give you another hearing.

Mr. Belnap: Mr. Commissioner, the railroads in this record bring forward our deficits since the record has been closed. Now, I do not know whether your Honors are going to make the decision on the record at the close of that period or whether one of your tests will be why

the Federal Barge Lines has not made a profit in these recent years. I cannot tell what you are going to do about that. All I can do under those circumstances is to present the report and the statements. May I reserve the rest of my time now, Your Honors?

Chairman Lee: You may.

Mr. Ames.

ORAL ARGUMENT OF MR. HARRY C. AMES

Mr. Ames: If Your Honors please, I would like to save [fol. 699] fifteen minutes for reply.

I appear on behalf of the Mississippi Valley Barge Line Company, a respondent in this proceeding.

We are a Denison Act carrier, so-called, certified to operate on the Ohio and Mississippi Rivers between Cincinnati and St. Louis on the north and New Orleans on the South.

Under authority of this Commission we have acquired and have merged with the Campbell Transportation Company which has the effect of extending our operating territory to Pittsburgh and the Pittsburgh area.

I believe I can make my argument plainer to your Honors if I make our general position clear right at the outset. We have had this position from the beginning. We have never deviated. We take the position first that the all-rail rates as such, are not put in issue by the order of October 8, 1944.

Second, the all-rail rate structure in 1934, and taken as a whole, must be presumed to be well within the limits of reasonableness because under the substantial—under it, substantially a third of the railroad mileage was in receivership.

Third, if we, as a barge line can take that rate structure and (a) grant to the rail carriers the same differential they [fol. 700] would receive on all-rail traffic (b) absorb the cost of transfer between rail lines and barge lines; (c) accord to the shipping public a differential created and maintained at our expense, and (d) compute or come out with a profit we have a place in the economic stream of transportation.

Commr. Splawn: Are those four things what you expect in the future?

Mr. Ames: We expect those at all times, Mr. Commissioner Splawn.

Commr. Mahaffie: Including a third of the roads in receivership? (Laughter)

Mr. Ames: Well, I do not want the roads to be in receivership, no. I am talking—You bring this question up again——

Commr. Splawn: I inquire as to whether those four points are a summary of what occurred in the thirties, or of what you expect in the late '40's and '50's.

Mr. Ames: If they do not occur, I would say we have no place in the transportation picture. I would like to emphasize that by giving you an actual illustration of a so-called three-way movement. I ask you to visualize a movement from Columbus, Ohio to Dallas, Texas, or Little Rock, Arkansas would be a better one. The rail lines in this movement would interchange traffic with us at Cincinnati and Memphis. A normal rail route—under this, the Penn-[fol. 701] sylvania Railroad would haul the business to Cincinnati, and the Louisville and Nashville to Memphis, and the Missouri Pacific to Little Rock.

In this haul we replace the Louisville and Nashville as a segment on that through route. As a condition of our replacement of the Louisville and Nashville we accord the Pennsylvania and the Missouri Pacific precisely the same division they would have received if the traffic had moved all-rail over the Louisville and Nashville.

After paying those lines their normal divisions, out of the available balance if we can match our costs, provide a differentail pay for the cost of transfer and make a profit then we are in. If we cannot, we are out.

Now, from this illustration, I think it is perfectly obvious that under our theory of the case the measuring rod which determines our fitness or unfitness in the transportation picture is the rail-rate structure, not the rail cost structure.

In other words, in determining whether we have a place in the picture or not you have to match our costs against the rail rates.

That is the only practical test you can make in the case.

We have done this and have set up a plan of differentials in our original briefs filed in 1939.

Much of the argument which has been made throughout [fol. 702] this lengthy proceeding and throughout all of the

briefs centers around the importance or lack of importance in the case of the railroad cost structure. I concede that that question is a difficult one, and one on which there is bound to be a difference of opinion.

In this proceeding, reams of figures were introduced by the rail carriers purporting to show that the cost of all-rail transportation is lower than that involved in joint barge-rail transportation.

The Federal Barge Lines introduced very, very elaborate cost studies.

In our cost studies we approached the matter more simply. We showed our constant costs and our variable costs, and we distributed them and matched them against our so-called available balance out of the rail rate.

Commr. Barnard: Were they 1936 or 1939 cost?

Mr. Ames: They were made in, I believe—I am sure brought up to 1937. That is the Mississippi Valley costs. The basic figures for the railroads are 1933 figures.

Commr. Barnard: Those were the last figures you had?

Mr. Ames: They were expanded by a process of expansion. They took one cost index, 1937 or 1933, and they found for that particular item of cost there had been an expansion of 4 per cent. So they assumed that that expan- [fol. 703] sion applied to all costs and they blew up or expanded the 1933 costs to a supposititious 1937 level.

Commr. Barnard: That is the last we have?

Mr. Ames: Yes.

Commr. Barnard: 1937.

Mr. Ames: Yes.

Commr. Barnard: Do you think those are of any value as reflecting the costs today?

Mr. Ames: No, sir, they are utterly worthless.

Commr. Barnard: Then we have no cost evidence we can use here?

Mr. Ames: Yes, you have. You have a relative picture which was made at the time this proceeding was going on. And if you adopt your examiner's theory of this case you can make a binding order on that. If you come out with a final report and say that those costs reflect today's costs, I will say you cannot do that.

You do not have that in the posture of this case.

Now your cost study made a re-statement of the cost

figures of record. It did not make any independent study of its own.

And at page 11 of Exhibit 1350 of record, which is the cost section's exhibit, they made this statement:

"Based on the above data the general conclusion is drawn that the costs for the joint rail-barge routing is greater than that for the direct all-rail routing.

[fol. 704] "The important factors contributing to this result are the relatively high costs for barge terminal operations and the added terminal handling incurred on joint barge-rail traffic."

Now, fortified by such a conclusion on the part of your cost-finding bureau, it is quite natural that our railroad friends should emphasize the importance of rail costs as a determining factor in this case. They argue that such comparisons are conclusive on this Commission and that by force of them you must, as a matter of law, deny any difficult, or deny any differentials to the barge lines.

It is equally natural that the barge lines should seek to minimize that cost showing. But from the standpoint of our privately-operated line, I can only say this: We have never felt from the beginning that barge costs vs. rail costs provide the true test for differentials.

For the reasons I have stated we have always felt that the only real yardstick upon which to base our economic fitness or unfitness is a comparison of our costs against the rail rates.

We have tried to be realistic. We have always felt that so long as rail rates bear no resemblance, fixed or otherwise, to rail costs it is purely theoretical to use those rail costs as a measuring stick.

[fol. 705] I have handed Your Honors an exhibit marked Exhibit "A", and I would like to address myself to that at this time.

This is an exhibit of record No. 1300. I may say that movements shown on this exhibit are taken from one of the key railroad exhibits which has been accepted by your cost-finding section as a proper predicate for a re-statement of costs.

I show in the last column of that exhibit the percentage ratio of the actual rail rate to the cost which the rail witnesses undertook to demonstrate. You will observe that

they range from 115 per cent of cost to 407.6 per cent of costs.

Now these, if Your Honors please, are actual movements in barge-rail service. If you will turn over to page 2 of that exhibit I have set this out in graph form and I think it meets the eye a little quicker.

That jig-jag sam-buck line up at the top is the rate line, and the constant line at the bottom is the cost line. I put a dot for each rail rate on page 1 of the exhibit and then drew a line between the dots. That is your graph. That is your rail rate structure, and that is the comparison of that rail-rate structure with the rail cost structure.

I honestly and earnestly submit to Your Honors that it would be utterly futile and unrealistic to attempt to tie a differential structure against a cost line when the rate line shows a situation such as I show there on page 2 of that [fol. 706] exhibit—utterly unrealistic and futile.

Those rail rates, as I say, in 1934 had a third of the mileage in receivership. They cannot be reduced. The changes, the variation in those rail rates is a product of railroad management.

Commissioner Aitcheson: Isn't it rather giving consideration to the value of service?

Mr. Ames: Yes. That is why that top line is so zig-zaggy.

Commr. Aitcheson: Why should not value of service also be considered in connection with the barge rates?

Mr. Ames: We do. When you start with a reasonable rail rate you tie a reasonable differential to it and you come out with a reasonable barge rate.

Commr. Aitcheson: Are we to consider both the cost and the value of service?

Mr. Ames: I would say the value of the service is the criteria in fixing a value of the differential.

Commr. Aitcheson: We have to have two cutting edges for our pair of shears.

Mr. Ames: That is right. I get your question now. That is why I have said all along—have said it twice today and will say it again—our concept of the case is a comparison of our costs against the rail rates. You do need our costs because that is the determining factor as to whether we can [fol. 707] afford to make a differential and absorb these unloading transfer charges and absorb the differential, so to speak. All of that is done at our expense. And you have

to have our costs in order to determine whether we can afford to do that.

Commr. Splawn: That is where you claim the inherent advantage in the cost of the service, Mr. Ames?

Mr. Ames: Yes, sir, and I believe that the cost-finding studies will show on the movement of oranges to St. Louis that the port-to-port costs are lower than the all-rail costs.

Now, it becomes a question from there on whether you are going to hold the advantage of barge transportation down to the port, or whether you are going to try to spread it into the interior.

Now, I asked Dr. Edwards a question about that at the hearing. I pointed out to him that on his cost-finding exhibit he has shown that the cost of all-water transportation from New Orleans to St. Louis was 51 per cent of the corresponding all-rail cost. That is between ports. I asked Dr. Edwards: "Now, do you believe from the standpoint of transportation economics that the benefit of that low-cost transportation on products of agriculture should be squeezed down to the port, or do you believe that it should reflect itself into the interior?"

To which the witness replied: "Well, the benefit should be [fol. 708] carried as far as they will reach."

To which Commissioner Miller added, "I do not think any one will deny that that should be extended into the interior as far — it will go."

Now there is your problem. We can get traffic between those ports cheaper than the rails can.

When we go beyond the port, 100 miles, 200 miles, 300 miles, then we have to commence to digest various added expenses. First of all, we have to bear the expense of getting that traffic from the barge to a railroad car. Then we have to get that railroad a division.

We give it the same division it would get if it interchanged with a rail carrier.

When that added expense of ours wears itself out, and we get down to the point where we cannot do it any more, then we are out of the picture.

I think in a case of this kind the Commission is entitled to give some weight to the proposition that the railroads after all are the dominating agency of transportation. We are merely a supplement. There is an exhibit of record in this case—it is 496-a, introduced by a witness from the

Wisconsin State Commission. He was undertaking to show the increase in rail traffic in 1936 over 1934, in the State of Wisconsin. The significance of the comparison struck me at that time. In that one state alone the railroad carload [fol. 709] originations had increased from 1934 to 1936 more than the entire traffic of all these barge lines combined.

Now, I do not think it is any wonder that the railroads have told you in their briefs "These barge lines can fold up with scarcely a ripple in the transportation world."

Commr. Mahaffie: Going back for a moment in your statement with regard to the barge lines putting the commodity in a railroad car. Does that apply to l-c-l-traffic also?

Mr. Ames: Yes, sir. We have to bear all of the costs of getting the cargo from the barge into the railroad car.

Commr. Mahaffie: That does not go to a freight house?

Mr. Ames: We have a freight house to take care of that. We have a freight house at Cincinnati——

Commr. Mahaffie: But you do not at all of your ports?

Mr. Ames: All of our regular ports where we have l-c-l service. I do not know that we have at all of our ports.

Commr. Mitchell: This is apparently a new old matter to the Commission but it is new to me. Do I understand that your company is a privately-owned company?

Mr. Ames: Yes, sir.

Commr. Mitchell: Do I understand that they have been making money?

Mr. Ames: Yes, sir.

Commr. Mitchell: Do they operate in the same manner [fol. 710] as the Federal Barge Line?

Mr. Ames: I cannot tell you that, sir. I do not know how they operate. I know what we are doing.

Commr. Aitcheson: Well, if you do not know, how do you expect us to know?

Mr. Ames: Well, I say I cannot answer for the Federal Barge Lines' operation.

I still say so.

Commr. Aitcheson: Is it not visible to your people, Mr. Ames?

Mr. Ames: Well, I am talking about myself, sir. My people probably know how they operate. I was answering the question that I thought was addressed to me personally.

Commr. Miller: You were answering from the record?

Mr. Ames: They have a great number of exhibits in the record.

Generally speaking, I think the operation is about the same. That is, the physical handling would be about the same.

Commr. Aitcheson: Does the record show why one is profitable and the other is not? I take it that is what Commissioner Mitchell is talking about.

Mr. Ames: Well, Your Honors know they have this Warrior River set-up, the Missouri set-up, the upper Mississippi and the Illinois. You know they have those operations. [fol. 711] You know that we do not.

The Federal in this case chose to make their showing on the combined operation. They did not make segments of their operation. They put their case in as a whole. And I think that probably explains why we came out with better results than they did.

Commr. Splawn: On your theory of this case we will not have to worry much about these cost data?

Mr. Ames: Not the railroad costs.

Commr. Splawn: It is your theory, as I understand it, that the cost data are not very relevant here. If you can do what you propose in those four points you will, and if you cannot you will not. That is you want a little leeway to try?

Mr. Ames: That is correct. Our annual report shows that in 1947 we had a gross revenue of $4,848,000, and a net profit after taxes of $446,000, which is approximately 10 per cent of our gross revenue.

Commr. Mahaffie: Your net—you are not on the rocks, then?

Mr. Ames: No, not yet. I will explain when I come to my next exhibit, however,——

Commr. Mitchell: It is very interesting information, Mr. Ames.

Mr. Ames: Thank you, sir. We are rather proud of it.

[fol. 712] Commr. Mitchell: I should think you would be.

Mr. Ames: I think we could spend hours here arguing the philosophy of this case, but I do not think any of us could express it any better than Examiner Hosmer has at sheets 30 and 31 of his proposed report.

I would like the privilege of quoting those statements. He says this:

> "When the Barge Line 'bears the burden of the differential,' it receives a smaller amount of revenue for its share of the joint service than a competing rail carrier obtains for rail transportation. As a component of the competitive system of transportation which prevails in this country it may legitimately do this if it feels compelled to accept such a burden because of the inferior value of its service. Presumably, it would not ordinarily do so without determining whether its reduced division would cover its operating costs.
>
> "If it performed service at less than cost, it would be guilty of an unfair and destructive competitive practice which might call for the exercise of the Commission's restraining powers."

I have never read a more statesmanlike statement of a difficult question than that. It says in effect that we, as business men, having arrived at a port with a lower cost [fol. 713] than corresponding railroad traffic can produce, or reflect, we, as business men have a right to reflect that saving into the interior as far as we can, and as common carriers, we have that duty.

And that is your problem. You can solve it without undertaking to say that these stale costs of record are the costs today.

Now, I would like to call your attention to the second exhibit that I handed to you. It has to do with our economic situation today. The changes are startling.

When we went into business in 1931 as a Denison Act line, from Cincinnati to New Orleans, we were a package carrier. We went into business, Mr. Childress and Mr. Rand and other St. Louis business men on the theory that the public would support and require a fast package line running from Cincinnati to New Orleans and St. Louis to New Orleans. We asked for a differential basis slightly less than the differential basis in effect on the initial Federal Barge line; not too much less but slightly less, because we thought our faster package service would enable us to get a little higher rate.

We soon found that we would have to have a corresponding differential and we soon found that the difference be-

tween our package service and that of the Federal was not great enough to warrant any great difference.

When we started in business, we did not handle a pound [fol. 714] of anything except merchandise freight in carload and less than carload quantities. That was 100 per cent of our business.

In this exhibit I have handed you I have started with 1935, and you will note from this exhibit that that condition persisted up to 1935. We were still 100 per cent package carriers.

We had no barge-load traffic whatsoever, no bulk traffic. In that year we handled 141,896 tons of joint barge and rail business which constituted 36.5 per cent of our total business, a very, very potent figure at that time.

In 1947, just look at the difference. Our carload and less than carload tonnage had dropped from 388,000 to 79,000. Our joint traffic with rail carriers had dropped from 141,000 to 36,000.

The percent of our joint barge rail traffic to our total traffic is now 1.7.

Commr. Miller: I judge that you are not very much interested in joint rates now?

Mr. Ames: Yes, we are. But I thought that I ought to give this situation to Your Honors, because I thought you would want to know what the relative importance of this joint traffic is today as compared with 1935.

Now, in 1947 we began incurring heavy losses on this [fol. 715] merchandise traffic, due chiefly to the level of the rate, of course the rail rate which is our ceiling and due more than that to the expense involved in transferring freight, the stevedoring expense.

We found that the more of that business we were hauling the more we were losing and we had to take drastic steps to stop that loss.

Commr. Mahaffie: How did you get rid of it?

Mr. Ames: We embargoed it. We declared an embargo against all joint traffic except that moving from Cincinnati to Memphis and Cincinnati to New Orleans—that is, between.

We knew of no other plan to save our line from strangulation. We were losing money fast. At Louisville, for example, we had in our 8 weeks' study period dropped 56 tons of freight.

That may have been in two carloads. That is eight weeks.

At Evansville we had more traffic. We had very good traffic at Evansville, but we were a dollar and more in the red before the traffic got away from there. We were in the position of a fellow who had a small loss but a heavy turnover.

We came to you and told you about the embargo on that before we did it, and we told you why we were going to do it, and we put the absolute truth in our embargo.

In that connection I may take you back to Examiner Hosmer's statement at page 30 and page 31 about our ability [fol. 716] to handle traffic at a profit, and he says: "Presumably would not do so without a profit."

But then he says "If it performed service at less than cost, it would be guilty of an unfair and destructive competitive practice which might call for the exercise of the Commission's restraining powers".

Now, we just stopped handling traffic on a destructive, competitive basis.

Commr. Mahaffie: I read your exceptions rather hastily, but is it reasonably accurate for me to say that your quarrel with the Commission is mainly with respect to the level of the differentials and transit rules?

Mr. Ames: No, I would not say that we are quarreling on the level of the differential. We feel that his differentials came as inconsistent and we have suggested how it could be smoothed out. But I think if you take our criticisms by and large you will find that we would reduce his differential somewhat. We do take exception to his recommendation about transit and commodity rates. I will come to that.

Commr. Miller: Do you think that if those joint rates proposed in the report are put into effect, then you would increase your traffic, carload and less-than-carload?

Mr. Ames: We do not want to get out of that business. We handled in 1947, 36,000 tons. Now I am frank in saying [fol. 717] that in 1935 we probably handled more sugar than that, but we want to get back in that business.

Commr. Miller: My question asked that if these rates go into effect, then you would probably increase your traffic of that kind?

Mr. Ames: Yes, when we made a cost study, Mr. Commissioner Miller, we classified the traffic as A traffic and B traffic.

The A traffic was traffic which matching our cost against rates we could come out with a fair profit. The B traffic was out. That was traffic where we would lose money. There were some that were borderline. Now, since the increases the Commission has granted have taken effect we find that some of the traffic in the B category has moved up to A. And we have great hopes of being able to resume the joint traffic. That is why I say we want the Commission to enter an order in this case.

I would like to discuss briefly our exceptions which are few and not violent.

One exception we take to the Examiner's report is to a statement he made on sheet 23 which reads:

> "Admittedly the slowness of movement is sometimes unobjectionable or even desirable to a shipper, when the freight is to be stored after its arrival, for he saved storage costs while the shipment is in transit. [fol. 718] Under certain marketing conditions, the value of barge transportation to shippers of coffee, cotton linters, and sugar may be enhanced on this account."

I am not going to stand here and go into any detailed citations about that, but I submit, Your Honors, that the record in this case preponderates the other way. I have dealt with it fully in our brief and exceptions.

Commr. Aitcheson: But has that not been the general understanding?

Mr. Ames: No, sir. We find, for instance, in a commodity like sugar, I think it is fair to say that 80 per cent of the shippers know when that starts, that that is going to transit somewhere, but they will not pick our agency unless they get that differential.

Now, there was some effort made in this case to show that this slow time in transit had a storage benefit, but I maintain and I have quoted authorities that that is not true. If you preponderate this evidence, you will find that we won't get a pound of business until we have that differential.

In other words, I do not care whether that traffic is sugar, coffee or what, it will not even start on our line unless we get a differential.

I say that and I say that the record shows it.

Our second exception comes to that matter of transit. We have had a lot of trouble with transit with these rail-[fol. 719] roads.

In your earlier decisions in the 77 ICC case and the 151 ICC case and in the Denison Act accounts or cases, you always told these railroads when they gave a transit privilege on a rail rate, they must give it to us also.

In other words, you put in your orders this paragraph:

> "It is further ordered, that the joint rates prescribed shall be governed by the same special rules, regulations and practices as govern, apply or are available in connection with the all-rail rate on which the differential rates are based."

Now, since the 1940 Act was passed, which carries that provision I believe in Section 322 about the repeal of the Denison Act and then saving your Denison Act orders and so forth, we have had a lot of trouble with the railroads.

They refuse to believe any more that that thing means anything. They refuse to believe that order of yours has a continuing effect. Every time they publish a new transit —I will not say every time, but I will say a lot of the times they say that it only applies in connection with all-rail rates. That cuts the barge lines out of that business.

We have asked for suspension, I imagine of about 20 of those proposed restrictions. You have never failed to suspend. You have never failed when the matter came to a hearing and a decision to condemn the restriction. And we [fol. 720] had hoped that when this case came out of the hopper, you would tell those railroads in plain language that when they put a transit rule in on an all-rail rate they must give the rail barge rate the same transit, just as you have always said from the very beginning.

Examiner Hosmer did not feel inclined to go that far. He said that while we could make out a fairly easy case on discrimination which, of course, we have—I have six citations here—he said he hated to say it would be unreasonable not to give the barge lines the same transit, because in doing that, he might give us a transit rule that would be unreasonable for all-rail routes.

Now that is pretty subtle and pretty devious. That puts the burden on us of showing that a transit rate is reasonable for all-rail routes. What we are complaining about is the

dissimilar treatment that is a violation of paragraph 4 of section 3—a discrimination against the interests of connecting lines, and I have always maintained it is an unreasonable practice under paragraph 6 of Section 1.

Although I have the highest respect for the Examiner, I do not agree with him in that regard. I believe you should do as Commissioner Barnard as chairman of Division 4, tried to do awhile ago—to get the railroads to stop this business so we would not have 24 complaints a year about them and never lose a one—we have never lost a one of them.

[fol. 721] The last exception was with regard to commodity rates. The Examiner has limited the differential plan to class rates and column rates. We do not like that at all. It seems to me that the railroads would be in a position, if they want to, to thwart any order you make by simply changing plans and column rates to commodity rates.

I confess that I am not completely sure why Examiner Hosmer made that distinction. He did not say that the commodity rates were too thin for differentials, they do not need to worry the railroads, we would not have any. We will not get in that business. He seems to think that it would be inconsistent with Section 307 (d) to establish a differential rate and then let the barge lines and the rail carriers change that differential by mutual agreement. That flexibility was always carried in your Denison Act orders.

You also gave us that right when you made an order under the Denison Act to change the differentials by mutual consent. Now Examiner Hosmer seems to feel that when you provide or prescribe a rate or differential under 307 (d) it would not be compatible to allow any deviation from that at the instance of the two carriers involved.

We, of course, like the flexibility. We like to sit down with the railroads if the differential is too high, and change it. But if we have to give up commodity rates on account of that flexibility, why we will give up the flexibility.

[fol. 722] I see no reason—I see no logic in saying that we are entitled to differentials on class and column rates and not on commodity rates. We have never made that distinction.

Commr. Miller: How would you apply Examiner Hosmer's formula to the commodity rates?

It is not a formula strictly speaking; it is just differential here for the first class rates.

Mr. Ames: Well, in our set-up, Mr. Commissioner Miller, you will find in our exceptions we outline our whole plan. In substance it is this: If your commodity rates in cents per 100 pounds is nearer column 30 than column 29, apply your column 30 differential. There would be no difficulty about that.

Commr. Miller: Relate the commodity rate to a class rate?

Mr. Ames: That is right. And I do not believe that is the reason Examiner Hosmer refused to give us any differential on commodity rates. That is just a matter of bookkeeping.

I am going to start back to my chair before I say I wish to save the balance of my time for reply. (Laughter).

Commr. Aitcheson. Mr. Brown.

ORAL ARGUMENT OF MR. BROWN

Mr. Brown: May it please Your Honors, from the viewpoint of the general philosophy of the case, and the general [fol. 723] principles that have been argued by Messrs. Belnap and Ames, I think the American Barge Line Company is completely in accord.

There are of course differences in detail, but on the broad general philosophy of the case I think we are completely together.

Commr. Mahaffie: Do you mean you agree with both of these gentlemen who preceded you?

Mr. Brown: On the philosophy and general principles of the case, yes.

I believe that this accounting detail should all be written out of the case. It is practically admitted that it is stale and could not be used, and the point is obvious in any event, because of all of the changes that have taken place in the national economy since those figures were worked out.

I think I can use my limited time to best advantage by bringing your records up to date on the record as to American Barge Line operations. The Examiner observes at sheet 6, and correctly, that American was incorporated in 1927, succeeded two others which had been in operation for

some time prior thereto principally on the lower Mississippi and the Ohio Rivers. It owns 9 towboats—we have since acquired two more, I believe—with an average horsepower of approximately 1500 each, and 172 barges having an average carrying capacity of 807 gross tons each.

[fol. 724] In 1944 it had under charter or lease five towboats and 49 barges.

It owns terminal facilities at Glassport, Pennsylvania, near Pittsburgh, Louisville, Kentucky and Memphis.

In 1944 American had 92 sailings southbound and 73 sailings northbound between Pittsburgh and New Orleans. It also operated irregularly on waterways other than the Mississippi and Ohio Rivers apparently under special contracts.

Now, the reference to special contracts is in error. Between 1933 and 1941 the American enjoyed a more rapid growth in its traffic than the other two barge lines before discussed. It also has the best record of earnings. A considerable part of its traffic consists of bulk and other heavy-loading commodities including coal, coke, petroleum products, iron and steel articles, and scrap iron which in 1944 constituted 60 per cent of its total tonnage.

Commr. Mitchell: American is privately owned?

Mr. Brown: Yes, sir.

Commr. Mitchell: And you have made money?

Mr. Brown: Yes, sir. We have earned net revenues consistently. And I have just this morning checked the annual reports from 1941 to 1946, inclusive, which are stipulated into this record, and I find that the revenue position of American Barge Line Company continues good. In other words, we have always had a net.

[fol. 725] Commr. Miller: You carry little traffic on joint rates?

Mr. Brown: Very little.

Less today than we were handling at the time of these hearings. Because of war conditions and the necessity for speed and other factors we have lost a good part of what we were handling before. However, we are still very much interested in that line of traffic.

Commr. Mahaffie: Do you handle any that is offered to you, or have you also discovered some way to get rid of it?

Mr. Brown: Oh, no. We are still bidding for more. We do not want to get rid of it. We are very much interested in that traffic.

Commr. Mahaffie: How do you account for the fact that you handle so little of it?

Mr. Brown: Because we haven't got enough rates to handle it. In other words, we have a very limited line of joint rail-barge line rates. In spite of all our efforts in recent years we have no cooperation from the railroads and we have been unable to get in here any additional rates.

Then, of course, the intervening war conditions and necessity for speed has meant that what little we were handling has disappeared. But we are still interested in it.

Commr. Aitcheson: You mean you have a different line of [fol. 726] rates than your competing water carriers?

Mr. Brown: No, Mr. Commissioner, not from the standpoint of rate level, but from the standpoint of——

Commr. Aitcheson: Number of rates?

Mr. Brown: Yes, I think that is true. But it is only fair to say that we have not engaged so largely in less-than-carload and carload business as these others have. Our business has been primarily bulk.

Now, as to the operating scope that has expanded a great deal since this record was made, and under the Grandfather clause the American has been certificated not only for operations on the Mississippi and Ohio, on which it was operating as a Denison Carrier, but also on the upper Mississippi, the Illinois, the Ohio, the Tennessee, the Illinois Waterway and, in fact, we cover all that territory from the Twin Cities to New Orleans and Chicago to New Orleans on the tributary streams from Ohio up to Pittsburgh and the tributaries running into the Pittsburgh area.

Those decisions are reported under W552 at 260 ICC 783, and 265 ICC 231.

Now, as to the adequacy of this record to support orders of this commission we have not the slightest doubt that you have all the evidence that you need for that purpose, with a complete washout of this accounting detail.

[fol. 727] As I have suggested, that accounting detail is stale and worthless today.

But you have our record of operations. You have our rate comparisons. You have the annual reports of each of these barge lines right down to-date. And you have a fully

adequate basis there for an exercise—a sound exercise of administrative judgment without any reference to these remote accounting details. I think it only fair to say that ultimately I think you would arrive at a conclusion similar to that suggested by Mr. Examiner Hosmer of the plan to be adopted with various exceptions of detail that has come in.

Some of those exceptions are pretty important. There are two I would like to comment for American Barge Line Company. One refers to the effect of the recommended findings in ruling Louisville out as an interchange point.

American has a very substantial investment there. It owns all of the bonds of the terminal which is operated by a subsidiary and has used that port as an interchange with the Louisville and Nashville for a number of years.

The other point concerns the failure of the Examiner to make any specific findings with respect to Pittsburgh. Now, he observes correctly that American is satisfied with the joint rates it now has, but contends it should have additional ones, and then referring to the Pittsburgh one he also points [fol. 728] out that there is no reason for a change in those rates. Except for the railroads there should be no differentials at all, and lets the matter stand there.

It is our suggestion that if formal findings and orders are to be entered in this proceeding, as we think they should be, either those rates should be approved, or they should be set up in specific form so that that structure will not be left hanging in the air at the mercy of competitive forces over which American has no control. Otherwise, we stand on the exceptions, sir.

Commr. Aitcheson: Mr. Hollopeter.

Argument of Herschel A. Hollopeter

Mr. Hollopeter: May it please the Commission, I want to discuss in the brief time at my disposal the rail and barge services and rates in connection with the port facilities at Evansville, Indiana, and also the interest of the shippers of Indiana in this proceeding. I shall try to avoid involvement in any conflicting theories at this time, however.

Evansville is the Indiana port city on the Ohio River and is located in the extreme southwestern portion of the state. It is therefore ideally located to serve the shippers of Indiana in connection with rail-barge services on the lower Ohio and Mississippi Rivers. Our shippers therefore are defi-

nitely interested in the development of this port to its [fol. 729] greatest possibility.

The Mead Johnson Terminal Corporation provides at Evansville an up-to-date and efficient set of port facilities for the transfer of freight between rail and barge or truck and barge services. These terminal facilities have been developed by private capital at a cost of over half a million dollars.

They are designed and equipped for the most economical and efficient handling of all kinds of freight traffic between barge and rail or truck services. They were developed by private capital and devoted to public service under conditions reasonably assuring sound investment, we feel, as indicated by the transportation policy enunciated by Congress in the Transportation Act of 1920 and adhered to since.

I should like to quote just very briefly from the first paragraph of Section 500 of the Transportation Act of 1920, as follows:

> "It is hereby declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States and to foster and preserve in full vigor both rail and water transportation."

Commissioner Mahaffie: Just how are these terminals devoted to public service?

[fol. 730] Mr. Hollopeter: It is a terminal which serves for the transfer of freight between barge and rail or truck and barge in lieu of the barge performing the service itself. I want to deal with that a little later, too, Mr. Commissioner Mahaffie.

Now, there are several facts in this record that I would like to have the Commission give particular attention to. The present rail-barge and the rail-barge-rail rates that have been in existence have made this strategic and logical location of the Port of Evansville of no consequence. The record contains a statement from the witness for the railroads confirming that fact. He calls it the logical port for much of Indiana traffic and he says it is short-circuited by the use of the rate structure.

The formula under which these rates were constructed briefly provide that the rail-barge or rail-barge-rail rates shall be on a differential basis under the all rail rate from

point of origin to final destination. For general purposes we will say this was the 20-per cent differential of the port-to-port rail rates applied from the interior point.

As an illustration the first-class all-rail rate from Evansville to New Orleans was $1.87 at the time of this hearing, providing a differential of 37 cents on traffic from Indiana to the lower Mississippi Ports moving through Evansville. Yet by virtue of the same formula the rate from any point [fol. 731] in Indiana through Cincinnati, moving the traffic southeasterly to Cincinnati and then back to the port of Evansville down the river was 41 cents, making the rate or the charge for any movement from Indiana points cheaper through the Cincinnati gateway than through the Evansville port.

Now, this came about, of course, by strict—and I believe too strict—application of this formula by—this formula which the Commission had set up previously for the barge-rail rates.

What should have been done here, we think, is illustrated very well by what the carriers actually did in connection with the port of Cairo, Illinois—that being the lowest upper river port and having the lowest port-to-port rail rates for the basis of a differential.

The carriers provided for traffic moving through the Port of Cairo the same differential that obtained under the formula when the traffic moved to the higher river port of St. Louis.

Now, we have in Indiana located between the various ports on the river—and those important here I think are on the Ohio River—Cincinnati, Cairo, St. Louis and Peoria. Those in a sense surround the State of Indiana. In our traffic under the present rate adjustment it will move at a lower rate over through the ports on either side of us than it moves through Evansville.

In view of this situation at Evansville we have suggested [fol. 732] in this record that in the fixing of rates for the future, we think it would be wholly consistent and practical to equalize rates by all of the logical ports and provide somewhat similar to the following rule:

> "Subject to the prescribed circuity limitations, if they are to be adopted, the lowest joint rail and barge rate between any points established by the use of any

port would apply to all other ports of the same or lesser circuity."

That would mean that if we can make a rate through Peoria moving northwesterly to Peoria by rail and thence down the river to lower ports or lower territory, that that same rate, at least no higher rate, should be applied from the same points through Evansville.

The Examiner, in his proposed report would recognize most of these situations and he has generally recommended for Evansville a fair adjustment as compared with the other ports. That is not true and we would like to refer to those situations briefly with the request that they be corrected.

As one illustration, in appendix B the Examiner here proposes that the rail-barge rates from South Bend, Indiana to New Orleans and Baton Rouge would have differentials of 46 cents under the all-rail rate via Cincinnati and Peoria, but only 42 cents through the port of Evansville.

Now, the actual rail-barge distance from South Bend to [fol. 733] New Orleans via Evansville is shown by this record to be 974 miles, and via Cincinnati it is shown to be 1,066 miles, and via Peoria 1,036 miles.

With the economical cost of the Port Facilities at Evansville added to the lesser distance via that port, it would seem inconsistent to provide these higher rates there than via both ports of Cincinnati and Peoria.

We think it would seem consistent to provide no higher rates there than the rates via the ports of Cincinnati and Peoria.

Commr. Aitcheson: For establishing rates via Peoria, what rail rate would you use as a base?

Mr. Hollopeter: You would take the port-to-port rates, the same as any other rate from Cincinnati.

Commr. Aitcheson. How does that help——

Mr. Hollopeter: We say that certainly no higher rate should be made to Evansville than Peoria, because our traffic flows through Evansville ordinarily, whereas with a lesser rate——

Commr. Aitcheson: I do not understand how Indiana traffic can start way out towards the northwest and come down the river in that matter, and manner. Yet you say that is the natural route.

Mr. Hollopeter: Do I understand you to say that you say it is a natural route?

[fol. 734] Commr. Aitcheson: No.

Mr. Hollopeter: That is the point we are trying to make, Commissioner.

The application applied by the carriers in the past has created that inconsistency.

By virtue of the fact that the port-to-port rates, rail rate, from Peoria to New Orleans is the same from Cincinnati to New Orleans, it is higher than from Evansville to New Orleans and taking 20 per cent of it gives you a greater differential to apply against the inland to destination port. Say from Indianapolis to New Orleans, as a fixed basis, the all-rail rate. Through Peoria you get a differential of 46 cents. Through Evansville, there because of the shorter port to port distance, you only get a differential of 24 cents.

Commr. Aitcheson: Your theory is that the traffic would move from Indianapolis up to Peoria in preference to going to Evansville?

Mr. Hollopeter: It has had to do that in the past in order to get the rate. That is the inconsistency that we want the Commission to consider.

I do not mind saying that the Examiner was just as surprised at that as this Commission seems to be when the fact was presented in the record. But that is the fact and that is the thing that the witnesses for the railroads [fol. 735] remarked about in saying the situation is certainly inconsistent in blocking out the port of Evansville.

Now, I want to call one more situation to your attention and that is, at these private facilities at Evansville the record shows the cost of operation, or the cost of transferring freight from rail to barge or truck to barge is less than it is at Cincinnati or St. Louis.

The record shows for example, that the cost at Evansville at the time of this hearing was 77.2 cents per ton, while at Cincinnati, according to exhibit 211, the costs were $1.05 and .7 per ton, or 35 per cent greater.

We say, therefore, both because of the logical location of Evansville and the lower cost of transfer, certainly rates should not be made to shut that movement out of that port.

The record also shows that the shippers of Indiana are normally very much interested in the rail-barge service between Indiana and the southern ports and the south-

western territory. They used this service extensively before the present disturbed economic conditions developed and we are assured that they will use it again when these conditions readjust*ment* themselves.

In normal times and under competitive conditions industries must seek the lowest possible cost for the distribution of their products, and all of those that do not require a special expedited service will use a rail-barge service if [fol. 736] it offers some savings in cost.

With the present high level of all-rail rates the urge to use a lower cost service will be even more imperative than before the present economic disturbance when the rail rates were lower.

And I think it is unnecessary to call the Commision's attention to the fact, as you observed in your last annual report, that the class rates today in all official territories, or will be if the carriers are granted all they are now asking, some 86 per cent higher than in 1938.

In the southwest they are 41 per cent higher.

We respectively urge, therefore, that the Commission adopt the recommendations of the Examiner in that substantial and reasonable differentials under the all-rail basis be prescribed and that the Commission go even further than the proposed report in providing full and proper equalization of the ports and particularly the Port of Evansville which has demonstrated its right to that consideration.

Thank you.

Commisioner Lee. We will suspend until 2 p. m.

(Whereupon, at 12:30 p. m. the hearing was recessed until 2 p. m.)

[fol. 737] Afternoon Session, 2:00 p. m.

Commr. Lee: Come to order, please.

ARGUMENT OF MR. HERMAN MUELLER

Mr. Mueller: May it please the Commission, my name is Herman Mueller. I reside in St. Paul, Minnesota, where I am employed as Secretary and General Manager of the Port Authority of St. Paul. My appearance here is in behalf of the Mississippi Valley Association.

The Mississippi Valley Association is a non-profit corporation with membership consisting of shippers and other citizens in the twenty-two States comprising the area extending from New York, Pennsylvania and West Virginia to the Rocky Mountains and from Minnesota and Wisconsin to the Gulf of Mexico. The object of this Association is to promote the economic welfare of the people of the Mississippi Valley States, and of the nation as a whole, by developing the resources and promoting the commerce of the valley.

The Mississippi Valley Association was an active participant in these proceedings and in August, 1939 filed a brief, which, together with abstract of testimony, makes a volume of 522 pages. We also filed exceptions to the Examiner's proposed report. The abstract of testimony in our brief covers the testimony of 195 witnesses who appeared as representatives of the shippers throughout the valley.

The principal witness for the Mississippi Valley Asso- [fol. 738] ciation was C. E. Childe, who in those days was chairman of the Association's Traffic Committee. His testimony is abstracted at pages 463 to 499 of our brief.

The position of the Mississippi Valley Association in this proceeding, broadly stated, and as appears at page 4 of our brief, is that—"Joint through rail and barge rates should be maintained between all points of origin and destination, over all routes and via all ports, where a public demand exists for such rates, and where lower transportation costs resulting from the use of such water-and-rail routes would bring savings in transportation charges to the public."

The evidence offered in behalf of the Mississippi Valley Association includes a comprehensive proposal for a new and more extended joint rail-and-barge rate structure. These proposals are embodied in Exhibs. No. 1080-1085, with fully explanatory testimony by Witness Childe. These rate and differential formulas and their proposed application represent a tremendous expenditure of intelligent study, effort and time and, to put it very mildly, it is most surprising and disappointing that in the preparation of the proposed report this important contribution to the record has been wholly ignored. This omission, therefore, is the basis for our first exception to the proposed report.

A careful reading of the proposed report fails to reveal

a single word or passage that would lead anyone to even [fol. 739] suspect that rate formula proposals were submitted by anyone other than the carriers.

The contrast between the apparent failure of our proposed rail and barge rate structure to make any impression on Examiner Hosmer and the impression it made on the Trial Examiner when Mr. Childe was testifying is, in my opinion, quite significant. I refer to several questions asked by Examiner Howell and answers by Witness Childe.

Commr. Mahaffie: Mr. Mueller, did you file an exception?

Mr. Mueller. Yes.

I refer to transcript pages 11526-30 and 31. They are as follows:

"Examiner Howell: Well, when you take a distance scale, rail service, and then you add what you think is a reasonable compensation from the port to the interior point, you are arriving at a reasonable rate aren't you?

"The Witness: Yes.

"Examiner Howell: And you have told me that the result of adding a division of a joint rate, instead of distance rate from the port, whether local or proportional, makes little difference?

"The Witness: That is correct.

"Examiner Howell: Then if that is true, what you are trying to determine is a reasonable through rate and your differential is merely the difference between the rail rate [fol. 740] and the reasonable rate, when you fix the rail-barge?

"The Witness: That is correct.

"Examiner Howell: Well, that is what I had in mind. Now, as I understand it, the Federal arrives at a differential and then determines its rate. You arrive at the rate and then that determines the differential, don't you?

"The Witness: That is correct.

"Examiner Howell: . . . Now, Mr. Childe is here for the shippers of the Mississippi Valley, and while he has labeled his scheme one for determining differentials, it seems perfectly patent to me that what he is trying to figure out is the lowest possible, lowest justifiable barge line rate; in other words, he wants to put the Mississippi Valley on the map in a competitive way with other markets, with other sources of materials, whereas with your scheme

the differential is the objective. With his scheme the lowest possible joint rate is the objective."

I refer to transcript pages 11530 and 11531.

There can be no doubt that Examiner Howell was impressed by the logic of the Mississippi Valley Association's formula for arriving at reasonable differentials.

Although there may be no significance, it is interesting to note the great number of situations where the differentials recommended by the Examiner are the same as, or only at slight variance with those presently in effect. To illus- [fol. 741] trate, I cite the following class 100 differentials between St. Paul and the following points:

Commr. Miller: What would Mr. Childe's differential be? Do you have that?

Mr. Mueller: I have some of those in connection with other illustrations further on, if you please.

Between Minneapolis–St. Paul

Class 100 Differential

and	*Present*	*Examiner's Prop.*
Chicago, Ill.	22	20
Peoria, Ill.	22	22
Centralia, Ill.	29	28
Chillicothe, Mo.	11	13
Cincinnati Ohio	23	22
Atlanta, Ga.	41	37
Little Rock, Ark.	43	44
Dallas, Texas	22	24
Biloxi, Miss.	50	51
Alexandria, La.	50	45

In view of the fact that the present rail-barge class rates are made on the percentage formula prescribed in Ex Parte 96, which formula, the Examiner holds, must now be completely abandoned and discarded, it seems strange that there should be such close resemblance between present and his proposed differentials.

[fol. 742] The results of applying the M. V. A. formula are, generally speaking, quite different from those which were proposed by the Federal Barge Lines, which latter apparently had considerable influence upon the measure or amount of the differentials which Examiner Hosmer

recommends for your approval. To illustrate, I will cite a few comparisons taken from Exhibit 1085:

Between Twin Cities

and	*Present*	*M.V.A. Proposed*	*Exam's Proposed*
Atlanta, Ga.	41	76	37
Dallas, Texas	22	62	24
Alexandria, La.	50	100	45
Joplin, Mo.	23	41	18

Certainly, such substantial differences merit most thorough study and careful consideration to determine which is the more logical and reasonable. But as I have already stated, the record as it now stands indicates that the formula which produces the more attractive differentials has had no consideration whatever in arriving at the Examiner's recommendations.

If, as the Examiner correctly states, the Commission is, as a practical matter, in the same position as if called upon to devise an entirely new rail-barge rate structure, then it is certainly to be expected that full consideration shall be given to all proposals properly submitted for its consideration, and especially when they are submitted in behalf [fol. 743] of the people who pay the freight.

I earnestly urge that the rate structure proposals presented by the Mississippi Valley Association be given most careful consideration before your final conclusions are reached.

Our second exception to the proposed report goes to the inadequacy of the rail-barge rate structure which the Examiner would have you prescribe. By that I mean that the existing and proposed territorial boundaries should be substantially extended in several directions so that more people may be benefited.

Additional gateway ports should be used as points of interchange between the railroads and barge lines and at least two barge lines, rather than only one, should be used in determining practical and economical through routes. This feature of the Mississippi Valley Association's proposed joint rate structure is also fully set forth in Witness Childe's Exhibits 1080 and 1085 and his explanatory testimony which is abstracted at pages 463 to 499 of our brief.

We believe that we have amply shown the logic and reasonableness of our proposal that the territory to be served by joint through rates, roughly described, extends from the Atlantic Ocean and Gulf of Mexico on the east and south to the intermountain country and Canadian border on the west and north. There should be no artificial or arbitrary limitations on the use of river and river ports. [fol. 744] For example, the Chicago and Pittsburgh gateways as well as Peoria and Cincinnati, should be used where the application of a proper formula results in lower joint through rates.

The Ohio, Mississippi and Missouri Rivers in combination, and the Illinois and Missouri Rivers in combination, provide great water arteries to serve certain territories. Likewise, the Ohio River in combination with the lower Mississippi River forms a practical route and, of course, there are other equally practical and logical combinations. They are all parts of the interconnected Mississippi River system, improved by public funds for public use and we respectfully urge that the public is entitled to through routes and joint rates over all of them to whatever extent their use will reduce transportation costs and serve a useful purpose. The fact that some of those river-combination routes would, at present, involve the use of two barge lines does not, in our opinion, justify denial of joint through rates.

On this phase of the investigation, also, the Examiner's proposed report will be searched in vain for any disclosure that the record contains comprehensive proposals supported by convincing evidence.

A few illustrations, I feel confident, will impress upon Your Honors the necessity for a careful further review of all the evidence which, I submit, demonstrates the inadequacy of the present—and of the Examiner's pro- [fol. 745] posed—joint rate structure. For more complete information reference is made to Exhibits 1085, 1093-4 and 5 and the abstract of testimony at pages 463 to 490 of our brief.

Among others, this evidence points out the logic of using the port of Chicago as compared with Peoria. For example, from New Orleans to Milwaukee via Peoria our formula produces a first-class differential of 65 cents while via Chicago it would be 83 cents. There is a navigable

channel all the way to Chicago, so why turn the traffic over to the railroads way back at Peoria?

Between New Orleans and South Bend, Indiana, our formula produces differentials of 57 cents and 74 cents respectively, via Peoria and Chicago. The Federal Barge Lines proposed South Bend group stops at, or close to, the Buffalo-Pittsburgh line and no rates are proposed by Federal between its ports and Trunk Line and New England territories. The Examiner apparently adopts those proposals. I call attention to the fact, however, that under our formula the differentials are approximately the same from New Orleans to New York as from New Orleans to South Bend.

Commr. Mahaffie: Under your formula do you allow the railroad a division as its portion of the through rate? Where does the shrink come under your formula, under the barge portion or do you have shrinkage in the railroad, too?

Mr. Mueller: The shrinkage all comes out of the barge [fol. 746] earnings under this formula.

Commr. Miller: I should think the Examiner has considered the proposals of Mr. Childe because he has made the largest differential he can according to his report and it now allowing the barge lines any profit.

Mr. Mueller: Your Honor, of course I do not know to what extent, if any, he considered those proposals. I merely say that the report does not in any way indicate that they were given consideration.

Commr. Miller: I say he did not answer it in the report but inferentially I would say he did.

Mr. Mueller: I am not accusing him of not giving consideration, but it seems to us that if there is anything radically wrong with the proposals that we made, the shippers of the Mississippi Valley are at least entitled to an expression from the Commission indicating in what respect, if any, they are wrong.

Commr. Mahaffie: Let me ask you this: I have been following you as well as I could, but would you leave under some of those differentials you have discussed any substantial amount for the barge portion of the haul?

Mr. Mueller: Oh, yes.

Commr. Mahaffie: When you get up around $9.00, you would still leave some earnings for the barge, would you?

Mr. Mueller: Yes.

[fol. 747] Mr. Mueller: This naturally raises the question, why the proposed South Bend group should stop at Buffalo instead of going through to the Atlantic Seaboard. And, of course, by using the Mississippi and Ohio Rivers in combination to Pittsburgh, for example, instead of the Illinois River to Peoria *ro* Chicago, you get much more attractive results.

Now let's take a look west of the Mississippi River. Federal proposes no joint rates between Kansas City and Southwestern Territory and the Examiner apparently follows along. Our formula definitely indicates that such rates should be established. For example, from Kansas City of Little Rock our formula produces a differential of 35 cents. Why shouldn't rates be established between these points when from St. Louis to Little Rock Federal proposes 27 cents, the Examiner recommends 25 cents, and our formula would make it 24 cents? Between the Kansas City and Alexandria, Louisiana, groups, Federal makes no proposal and the Examiner concurs. However, our formula would produce a differential of 53 cents.

Between the Chicago and Norfolk, Nebraska groups no rates are proposed by Federal or the Examiner. Here our formula, via Kansas City, produces a differential of 25 cents, which is fully as attractive as many which the Examiner does recommend. For example, from St. Louis to Norfolk, Nebraska, via Kansas City he recommends 22 cents.

Between Kansas City and Fargo, North Dakota, rates are [fol. 748] proposed by Federal and the Examiner for application only via St. Paul and Burlington, Iowa, with a differential of 15 cents. By using the rivers for the longer haul between St. Paul and Kansas City, our formula would effect a saving of 41 cents. Likewise, between Kansas City and Rhinelander, Wisconsin, via St. Paul, our formula produces a differential of 36 cents, whereas Federal and the Examiner apparently find no joint rates justified.

As I have already indicated, the Ohio, Mississippi and Missouri Rivers form an east-west water route that should be used to a far greater extent than the present rate structure permits. For example, no joint rates are proposed by

Federal or the Examiner, between Missouri River ports and Central—Trunk Line—New England territories. Between Kansas City and New York, the M. V. A. formula produces a differential of 59 cents, using the Pittsburgh gateway. Between Pittsburgh and the Salina, Kansas group, via Kansas City, our formula effects a saving of 78 cents and between Pittsburgh and the Denver group, 72 cents.

Commr. Mahaffie: Going back to your Kansas City-Little Rock group, how would that traffic normally be handled?

Mr. Mueller: As I recall, the gateway would be via Memphis.

Commr. Alldredge: I notice Mr. Childe's brief says barge costs are decreasing from year to year as channel and operating conditions improve and more traffic is attracted [fol. 749] to the barge routes. This brief was written in 1939. Has that prediction held good?

Mr. Mueller: It says the barge costs are decreasing?

Commr. Alldredge: Yes.

Mr. Mueller: I would not say so. I am sure the barge costs have been increasing the same as all other costs, Mr. Commissioner.

Commr. Alldredge: Do you think that the increase in the barge costs has been on about the same ratio as the increase in the rail costs?

Mr. Mueller: I would be in no position to venture an opinion on that, Mr. Commissioner.

Commr. Alldredge: Well, if the Commission can not get some information to back that up, then would not Mr. Childe's formula have to be changed?

Mr. Mueller: I do not believe the formula would need to be changed.

Commr. Aitchison: I did not understand your reference to rates to Rhinelander. Just what was that? Rhinelander is an inland point, is it not? How do you ship from St. Paul to Rhinelander with a barge line interested?

Mr. Mueller: All of my references were to joint rates between rail and barge to and from inland points, Mr. Commissioner.

Commr. Aitchison: How did you get a joint rate from St. Paul to Rhinelander?

[fol. 750] Mr. Mueller: Not from St. Paul. I was speaking about rates from New Orleans and intermediate ports going to Rhinelander via Peoria versus Chicago.

Commr. Aitchison: I did not understand. I thought you said St. Paul.

Mr. Mueller: No. If I did, I was in error.

In the same way, use of the Ohio and Upper Mississippi Rivers combined, will permit the establishment of attractive rates. To illustrate, between Pittsburgh and the Mason City, Iowa group, via Dubuque, the M. V. A. formula differential is 35 cents, and from Cincinnati it is 26 cents. From Pittsburgh to Fargo, via St. Paul, we get 56 cents and from St. Paul to Baltimore, via Pittsburgh, 50 cents.

Between the Twin Cities and points east of Chicago, via Dubuque, the M. V. A. formula produces substantally the same differentials as if the traffic had its origin or destination at Chicago. Therefore, it is our contention that the route using the Mississippi River from St. Paul to Dubuque, and rail beyond, should be opened up to and from all points east of Chicago. We respectfully urge this in addition to opening the route via Cairo and the Ohio River, so that the public may have the benefit of the savings which are attained via these alternate routes.

In addition to the foregoing, I again invite attention to the many illustrations set forth in our brief at pages 463-488 [fol. 751] to show the inadequacy of the present joint rail-barge structure and the necessity for use of the main stems of the Mississippi River System as a unit, instead of as separate and independent segments, in determining the points of interchange between river and rail. There should be no artificial limitations on the use of the river routes. The fact that Federal does not operate on the Ohio River and that Valley does not operate on the Illinois and Missouri Rivers, etc., etc., is no reason why these rivers and the barge lines' respective services should not be used jointly where they form natural and reasonable routes. We respectfully submit that these factors merit far greater consideration than they have been given by the Examiner in the preparation of this report.

Commr. Mahaffie: Do not the barge lines make joint rates with each other pretty freely?

Mr. Mueller: No, it has not been their practice.

Commr. Lee: Your time has expired, Mr. Mueller.

Mr. Mueller: I am very sorry.
Thank you, gentlemen.
Commr. Lee: Mr. Dyer.

ARGUMENT OF MR. W. M. DYER

Mr. Dyer: If Your Honors please, I am W. M. Dyer. I represent the Wichita Chamber of Commerce, Woodstock, Kansas, and its shippers. Wichita is down in that territory which, it seems, no particular group of carriers wants to [fol. 752] own, or in that territory in which it seems we are disowned by all types of carriers. That has been true in cases in the past and it seems to be true in so far as the proposed report in this particular case is concerned, due to the fact that the Examiner, in adopting largely the proposals of the barge lines, obviously favored them.

Obviously the fact that we are not given much consideration is because the barge lines failed to give us the consideration. We are in that territory between where an adjustment basing over the Kansas City river port and the adjustment basing over the Memphis River port obtains.

In my discussion of rates here I have not taken into consideration the Ex Parte 162 increases. In order that you might have some idea as to the location of Wichita clearly in your mind as we discuss these figures, I would like to point out that we are in south central Kansas, 200 miles southwest of Kansas City, and these figures are in the record, 90 miles south of Salina, Kansas, 171 miles north of Oklahoma City, 96 miles northeast of Enid, and 151 miles northwest of Tulsa. This is a figure, I think, that is important because we are only 15 miles more distant from Kansas City, Missouri, gateway than Salina. We are only 35 miles more distant than Oklahoma City from the Memphis River port gateway. I think those two figures are significant.

Now to give you some of the effects of the Examiner's [fol. 753] proposed report. The relationship that the Commission prescribed in the 17000 Case was four cents, four cents in Wichita over Salina. In the proposed report here, we will be 27 cents over Salina. That is, through the Kansas City gateway port.

In the Commission's decision 13535 and 17000 on reconsideration, Oklahoma City was placed at 30 cents over Wichita from Chicago, and the figures that I gave you

a while ago with reference to Salina were from Chicago also.

Under the proposal here in this case, Oklahoma City will be four cents under Wichita through the Memphis gateway port, and still our distance is only 35 miles greater than Oklahoma City gateway distance through the Memphis gateway from Chicago.

Commr. Alldredge: Mr. Dyer, does Wichita now have these rail and water rates?

Mr. Dyer: To some extent, yes. I could not say exactly to what extent they do. Of course, I think they do have rates established on the old Ex Parte 96 basis. Of course, in some instances the formula there established cut us out.

Commr. Alldredge: You are within the 10 per cent zone, are you not?

Mr. Dyer: I could not say. In some instances we would be and in some instances we would not be.

Commr. Alldredge: You mean now? I am speaking of the present.

Mr. Dyer: That is way I say, at the present time. In some [fol. 754] instances we would be in the 10 percent zone and in other instances we would be in the 20 percent zone. From Chicago we would be in the same zone as Salina, yet this proposed report will increase the advantage of Salina from 4 up to 27 cents or, in other words, give them an advantage of 23 cents over what we have at the present time.

Commr. Alldredge: Have you used rail and water service?

Mr. Dyer: I could not say as to that.

Commr. Alldredge: Do you know whether Salina has used it?

Mr. Dyer: No, I could not say as to that. I suppose there has been some movement, but from what we heard here this morning from the barge line carriers themselves, they have not had very much traffic beyond the ports. I have made no investigation, myself.

Commr. Alldredge: What would be your natural port?

Mr. Dyer: Either the Memphis port or the Kansas City port. That is the point that we want to make. Since we are in the territory where we are, we should have the advantage of the best differential, Kansas City versus Memphis, which will keep us properly related with the Southwest and also properly related with Western Trunk Line Territory.

Now, still considering Chicago, the 17000 and the 13535 decision placed Tulsa at 8 cents over Wichita. Under this proposal, Tulsa will be 26 cents under Wichita. Now, that has its effect in so far as competition within the territory [fol. 755] is concerned, and 26 cents is a determining factor in the movement of freight.

I can recall when we had the official rail rates and a considerable part of the traffic at Wichita moved through the Texas Gulf ports as well as the South Atlantic ports because of the differential that we had under the rail rates that were in existence at that time. 26 cents is an important factor.

Commr. Miller: Well, you would not have anything moving on first class, would you?

Mr. Dyer: I do not know. There could be, I suppose. The records of these barge line carriers as to what they actually handled could easily bring out that point. I am sure I do not know what they handle.

These rates exist, nevertheless, Commissioner Miller, and of course it is the preference and prejudice that we are thinking about. As to the movement, I do not know what the movement actually is at the present time, and I do not know what the movement will be, but we are interested in the preference and prejudices created by the proposed adjustment.

At Joplin, Missouri, from Chicago, Wichita is now 22 cents over Joplin, Missouri. We will be 44 cents over Joplin, a 22-cent change in our relationship on rail rates.

Commr. Alldredge: Now, counting the water-rail rate here as against your all-rail rate, you would have an increase——

Mr. Dyer: No, as against the proposal of the barge-rail [fol. 756] rates at Wichita versus the barge-rail rates to Joplin and these other points that I mentioned because, Commissioner Alldredge, they are not proposing any barge-rail rates between Wichita and Chicago.

Commr. Alldredge: Then it would be all-rail rate versus the barge-rail rate?

Mr. Dyer: Which would establish that increased difference that the Wichita shippers would have to absorb in attempting to compete with the jobbers at these other points.

Commr. Alldredge: How much farther is Wichita than Joplin from Chicago by the route you have in mind?

Mr. Dyer: I do not know exactly what it is. It could not be much greater because Joplin is down in the southeastern part of the State and it might be inferred by the rate itself —the first-class rail rate is $1.78 and the Joplin rate would move through basic zone 1 and zone 2 territories, entirely, while the Wichita rate would move through basic zone 1, zone 2, and zone 3 territories. That would cut down the distance just a little bit.

Commr. Mahaffie: You say Joplin is in the southeast corner of the State? What State?

Mr. Dyer: The southwest corner of the State of Missouri, near the southeast corner of the State of Kansas. Thank you.

Now, let us take from Cincinnati, Ohio, to Wichita. The proposed report recommends 16 cents differential [fol. 757] at Wichita and a 28-cent differential at Oklahoma City through the Memphis gateway. In other words, there is a spread of 13 cents. The same thing is true at Tulsa.

At Joplin Missouri, they recommend 20 cents, which gives an increased spread of four cents.

At Kansas City, 25 cents, or an increased spread of nine cents.

It is those disturbed relationships that we are talking about, because we must compete with those towns and the jobbers in those towns in doing business out in the territory.

Commr. Alldredge: What is your position, then? You would just as soon have the differentials taken away from these other points and have them given to Joplin, or how would you correct them?

Mr. Dyer: Our position is that if the Commission should find that the barge lines are entitled to rates differentially under the all-rail rates, that that differential should be reflected by uniform percentage relationships because of the fact that we today have rates via circuitous rail lines when the rates are made where we do have movement via direct rail lines. We consider that the barge line operation, motor carrier operation, and railroads are nothing but a segment of the transportation system.

Commr. Alldredge: According to the argument this morning, you have heard them say that there would be a point at [fol. 758] which they would have to bring these differentials to an end. Do you agree with that?

Mr. Dyer: I do not know. I also heard the statement to the effect that we were willing to give the carriers their division of the joint through rate. Now, if a connecting line, a rail line, can grant divisions of the joint through rate for long distances, or regardless of distance, I do not see how a barge line segment in the operation there would change the picture at all.

Commr. Alldredge: Do they not propose to absorb the difference so that at some point they would have to stop absorbing? In other words, they would reach a point where they could not continue to absorb.

Mr. Dyer: I do not know as to that, Mr. Commissioner, but I can not see that the situation is any different. In other words the connecting rail line would get its full local from the river point? Then of course if the rail line got its full local from the river point, there would be a question of how far the barge lines could go before they would have to go out of business. But if it was a case of the division of the through rate, accruing to a rail line beyond the river port, or to the river port, I can not see where the picture would change any regardless of the length of haul.

Commr. Alldredge: Would not that division increase some with the distance?

[fol. 759] Mr. Dyer: So would your rate, Commissioner Alldredge.

Commr. Aitchison: Do you have any joint rates by rail from Cincinnati to Wichita by way of Memphis?

Mr. Dyer: I do not know, Mr. Commissioner.

Commr. Aitchison: That is what we are applying these formulas to, is it not?

Mr. Dyer: Yes, that is right.

Commr. Aitchison: Should we not know, then, whether there is any joint rate?

Mr. Dyer: I did not go into that feature, Commissioner Aitchison, because what I was interested in was what is being proposed here. I presume that we do have rates at other points in our territory. I did not have an opportunity to check and determine whether they had rates at the present time.

Commr. Aitchison: You used that illustration, did you not, by way of Memphis to Wichita?

Mr. Dyer: Yes, sir.

Commr. Aitchison: Is it not important to know whether there is a joint through rate or not?

Mr. Dyer: I used it to this extent, Mr. Commissioner: Of course, there is a joint through rail rate. I do not know whether there are joint barge-rail rates. The point I was making is this, that the differential proposed at Wichita in connection with traffic moving from Cincinnati is 16 cents under the rail rate, while to Oklahoma City, a point only 35 [fol. 760] miles less distant from the Memphis gateway and through the Memphis gateway, the differential proposed is 29 cents under the rail rate. To my mind, at least, that reflects discrimination and prejudice.

Commr. Aitchison: They are all pretty round-about, the way you have shown them, from Cincinnati to Memphis in a southwest direction and then northwest up to Wichita.

Mr. Dyer: The only round-about movement, Commissioner Aitchison, is the fact that you move an additional 35 miles over the Memphis gateway.

Commr. Aitchison: But from Cincinnati by way of Memphis to Wichita is a round-about movement, is it not?

Mr. Dyer: To the extent of 35 miles.

Commr. Aitchison: As compared to the direct line?

Mr. Dyer: Oh no, not as compared with direct line.

Commr. Aitchison: Why not talk about the rate making routes?

Mr. Dyer: What I had in mind here was the differentials, Commissioner Aitchison, and what effect those differentials, if applied in connection with the rail rates, would have and what they would do to the competitive situation at Wichita. Since it is the Examiner's proposal in this case to ignore entirely the formula of the Commission used in Ex Parte 96, that is. He says that it is impracticable. The barge line attorneys here state that it is impractical.

[fol. 761] Now, of course if you are going to establish a differential relationship in connection with barge-rail movement or a differential under the rail rates, then I think that should be uniform so that treatment accorded all points in the territory would be uniform and no preference and prejudice would be created, as is proposed in this proposed report.

Commr. Alldredge: Do you not think those differentials would have to fade with distance?

Mr. Dyer: I can not see how they would have to, Commissioner Alldredge, because of the fact, as I understand it, the barge lines take the position that the rails are entitled to only their division of the through rate. As your distance increases, your rate increases. The factor that would be retained by the barge lines would remain practically constant just the same as a movement between rails.

Commr. Alldredge: You do not mean to say, do you, that a barge-rail route can be made from Cincinnati through the port of St. Louis to Spokane, Washington, that will reflect the same differential under the all-rail rate as it would at Springfield, Missouri?

Mr. Dyer: No, I would not say as to that, because your traffic is moving under a different type or level of rates, but as long as your traffic is moving under either the 17000 or 13535 related scales, your increased distance is generally taken care of by increased rates and the barge lines [fol. 762] would retain the same division that, for example, the C.G.W. would get from Chicago to Kansas City and would pay the Santa Fe from Kansas City on the Albuquerque, New Mexico.

The increased freight rate would apply, and since the rails would be beyond Kansas City, they would only be receiving their division of the traffic while the barge lines would still be in the picture. Of course, an actual check would show as to what that would be. It would have to work out that way. It could not work out any other way.

Commr. Aitchison: You talk about divisions of a joint rate.

Mr. Dyer: That is what I understood they wanted.

Commr. Aitchison: Between Cincinnati, we will say, and Wichita by way of Memphis. If we are going to talk about the divisions that the rail lines get and that the barge lines get, we have to know if there is a joint rate in existence now.

Mr. Dyer: That is true. I would say that the Commission should place this restriction on it and we would not ask for joint barge rates except where there were joint rail rates through the port on two-way traffic and joint rail rates through the origin port and the destination port on three-way traffic, but as long as the railroads themselves

maintain rates through those junction points, I do not see why the barge lines should not be permitted to enter into [fol. 763] joint through rates if they are to have rates based differentially under the all-rail rates.

In other words, the Examiner proposed here to do away with rigid lines. The Examiner seems to have been faced with a difficult situation and naturally accepted the way open to him, the offering of the solution to the barge lines.

In our mind, the proposed rate, bases of rates as we have them here under Appendices B and C, reflect a partitioning, as it were, of the distribution territory enjoyed by jobbing points in our territory. Now, when you think of an improved rate adjustment, of the difference between 4 cents and 27 cents at Salina, only 90 miles away from Wichita, you can see what that is going to do to Wichita concerns, providing there is traffic moving via the barge lines on the basis of that rate between Chicago and Salina.

We think the differential should be uniform.

The Interstate Commerce Commission in its decision in 28300 mentioned the fact that it was removing preference and predudice. Yet the Examiner herein comes along and by his proposed system of differentials as set forth in Appendices B and C would establish a system of barge-rail rates which seethe with flagrant examples of preference and prejudice. That is why we are here. The proposal worries us.

Now, taking up the specific examples of differentials under the all-rail rate, take Salina, Wichita, and Joplin [fol. 764] from New Orleans through the gateways of Kansas City and Memphis. The differential at Wichita as proposed is 29 cents. At Salina it is 32 cents, and at Joplin 31 cents, giving Salina an advantage of 3 cents and Joplin an advantage of 2 cents.

Between Vicksburg, Salina, Wichita and Joplin the differential proposed at Wichita is 16 cents under the all-rail rate via the Memphis gateway, and by the way, Commissioner Aitchison, that is in a direct line, yet at Joplin the differential proposed is 23 cents under the all-rail rates and at Salina 30 cents under the all-rail rates to the Kansas City gateway, which gives Salina there a 14-cent advantage and Joplin a 7-cent advantage.

Now we will take Greenville, Mississippi. We have the

same situation there. Salina is given a 13-cent advantage and Joplin a 4-cent advantage.

Compared with Helena, Arkansas, through the Memphis gateway and the Kansas City gateway, Salina is given a 12-cent advantage and Joplin a 5-cent advantage.

Now, what we fear, too, is the fact that the Examiner states in the proposed report that there should be some freedom of action on the part of—I am through, am I not?

Commr. Lee: Yes.

Mr. Dyer: Thank you, gentlemen.

Commr. Lee: Mr. Schwartz.

[fol. 765] ARGUMENT OF MR. LOUIS A. SCHWARTZ

Mr. Schwartz: May it please the Commission, my name is Louis A. Schwartz. I am general manager of the New Orleans, Traffic and Transportation Bureau at New Orleans, and I appear in these proceedings not only on behalf of the New Orleans Traffic and Transportation Bureau at New Orleans, but also on behalf of the Memphis Freight Bureau at Memphis.

I do not think the ports of New Orleans and Memphis need to be described to your Commission. I think you are well acquainted with the fact that New Orleans is located at the mouth of the Mississippi River and near the Gulf of Mexico and is, we think, one of the principal ports of the country. Memphis is located in the mid-continent section of the Mississippi Valley and is a very important point for the transfer of rail and barge traffic.

Now, both New Orleans and Memphis participated in these proceedings in support of a system of barge-rail, rail-barge, and barge-rail-barge rates properly related to the all-rail rates. It is to the interest, in our opinion, not only of New Orleans and Memphis but also of the public generally that such a system be prescribed by the Commission.

I want to call the Commission's attention, although I do not think its attention need be called to it, to Section 307 (d) of the Interstate Commerce Act, as amended, which contains a specific mandate which leaves no doubt as to the [fol. 766] intent of *of* Congress with respect to join traffic. It directs that in the case of a through route where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find

to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

In this connection I refer particularly to the remarks of the Examiner, which are very pertinent in that respect, as will be noted on sheet 30.

Commr. Miller: That section was not in effect at the time of the hearing, was it?

Mr. Schwartz: What hearing will we take? Shall we talk about the hearing in 1934 or 1935, when the Commissioner came down to New Orleans, or the last hearing that reopened, which was in 1942? It all depends upon what hearing.

Commr. Aitchison: I think I can find an authority for you that this is part of the hearing today.

Mr. Schwartz: When the Commission instituted its investigation, but it is in effect today, and as Your Honor knows, it has been in effect since the Transportation Act of 1940.

Commr. Miller: As I recall, when most of this record was made, it was not taken into consideration because it was not in effect at that time.

Mr. Schwartz: That is correct, because Congress when it enacted 307 (d) had before it the legislative history of the [fol. 767] Dennison Act and it specifically provided, as you know, in the Act of 1940——

Commr. Miller: I am not trying to throw it out.

Mr. Schwartz: The Examiner does not throw it out.

Commr. Miller: I know it, but I just want to point that these rates of the water carriers were not published at the time of the original hearing.

Mr. Schwartz: You are correct in that, yes, sir. Here is what the Examiner says about Section 307 (d). He says the wording of Section 307 (d) which governs the wording in this proceeding is similar to that of many other provisions of the Interstate Commerce Act under which the Commission has a wide range of administrative judgment. There is nothing in that wording nor in the legislative history of the section to support a view that differentials can be found justified only on a showing of lower cost of operation by water. Congress may be presumed to have been aware that while the Commission in its barge line decisions had mentioned the reputed economy of water trans-

portation, it had not been over-critical of such evidence thereof as has been offered in these cases.

In my opinion, we should approach this problem from a practical standpoint. There must, of necessity, be prescribed by the Commission a proper and reasonable differential, barge versus rail, that the barge carriers ought to survive on. Shippers located at New Orleans, Memphis [fol. 768] and other points throughout the Mississippi Valley, 100 or more in number, almost to a man testified that barge service would not be utilized unless they, the shippers, were afforded a saving contrasted with all-rail service.

Now, again the Examiner recognizes that because on page 23 of his report he has this to say:

"On the whole, there is no reason to disbelieve the testimony of numerous witnesses for shippers who stated that their only object in shipping by barge was to save transportation costs. This testimony is borne out by loss of many kinds of traffic which the barge lines suffered during the war when the speed of movement became a more important factor than saving in freight charges."

On further on down, on sheet 24, he says:

"In any event, it seems likely that the shippers in the Mississippi Valley will continue to regard the barge lines as having very little or no value to them except as competing carriers whose effectiveness depends upon their maintaining lower rates than those which the railroads are able or willing to establish. Most of the shipper witnesses freely concede that a public need for efficient railroad service exists, but refuse to sympathize with the expressed fears of the railroads that the ability to supply such service might be impaired by the substitution of barge-rail for all-rail transportation."

Now, there is no secret about the utilization of barge [fol. 769] services, as I have already pointed out by the statement of the Examiner himself and the record is replete with this type of testimony. I will say for the shippers and receivers that I represent that unless the Commission prescribes differentials, barge under rail, they will not route their traffic over the barge lines. If this practice is followed by all the shippers, it goes without saying that the

barge services on the river will pass into history, as did the packet services at the turn of the century.

I repeat that in my opinion it is the clear intent of Congress not to scrap the water carriers operating on our inland waterways.

Now, as to the value of barge services to the shipping public, I could not possibly improve upon the facts referred to on page 23 of the Examiner's report, where he has this to say:

"The record supports the conclusion that most of the barge movement above referred to is due to the fact that the rates were lower than they would have been for all-rail shipment. Much evidence has been presented by shippers to show that from the standpoint of service barge transportation is inferior to all-rail."

The principal disadvantage is the longer time involved. The hazards of navigation offer an increase in the time required. When speed is essential, shippers must use rail [fol. 770] transportation as, for example, where it is imperative that a shipment of export freight must arrive at the port before the sailing date of a ship. Transfer of shipments from barge to railroad takes time. Many things are not adaptable to barge transportation. The handling between barge and car has caused damage in many cases to agricultural products. Painted surfaces and packaging make transportation of this character less desirable for this type of traffic. In the case of such commodities as corn, rice, coffee, barge transportation to some extent is conducive of deterioration or shrinkage, but must be handled in large quantities and shippers of grain find barge transportation less desirable on this account.

Another objection to barge transportation arises from the fact that the rates therefor are not generally subject to storage in transit arrangements applicable in connection with all-rail rates.

I might say this to the Commission, that we agree generally with the Examiner with respect to his findings, but I do not feel that he has gone far enough. He has treated only with the class rate differentials and left the commodity adjustment literally hanging in the air.

Unless the Commission treats with the commodity adjustments which represent an important segment of our rate

structure, there certainly will result a bob-tailed or lop-
[fol. 771] sided adjustment.

There is ample showing, as we see it in the record, to justify findings in connection with the commodity adjustment. Shippers at New Orleans testified at length as to the measure of differentials that are necessary to afford movement of their commodities via the barge-rail routes and that those differentials were discussed at length in the original brief that the Bureau filed in August, 1939.

We also except to the Examiner's failure to treat the transfer arrangements. We filed two exceptions to the Examiner's report. One was dealing with the failure of the Examiner to treat with the transit arrangements and the second was the failure to treat with the commodity adjustment.

As to the transit arrangements, it is my opinion that the rail carriers should be required under Section 34 to maintain the same transit arrangements in connection with barge carriers as they maintain between themselves, subject to differential rates via the barge-rail routes.

Whatever the Commission does as a result of this proceeding must be done under specific orders. Events in the past have demonstrated that nothing can be accomplished under permissive orders or through negotiation between the barge lines and the rail carriers.

We can not stress too strongly the broad economic issues that are involved in this proceeding in which the public is
[fol. 772] vitally interested. In fact, I do not think anybody questions the importance of rail carriers in the transportation picture. They demonstrated this importance beyond the shadow of a doubt in the last World War. The water carriers also played their part. Both types of transportation are entitled to their place in the transportation and economic structure of the country, and both types are entitled to rate structures that will permit them to exist and develop in their respective spheres.

I know that two opponents will follow me so, since I do not have time for rebuttal, there are two particular subjects I want to treat with.

First, I want to treat with the exceptions and the briefs that were filed by the Savannah Sugar Refinery, represented here today by Mr. Hillyer. These briefs and exceptions treat with two phases of the sugar adjustment, one with

the barge rates on sugar from New Orleans particularly to points in the Southeast, and the other with the question of transit in connection with rates upon sugar from New Orleans to the Southeast and other destinations in the Mississippi Valley.

First with respect to the barge-rail rates. The barge-rail rates were made an issue by the Savannah Sugar Refinery in Docket 23836, 173 I.C.C. 109. In that proceeding it was stated, of course, that the complainant was treating specifically, or more particularly, you might say, with sugar that [fol. 773] moved from New Orleans and was stored in transit at Birmingham and was reshipped to destinations in Southern Territory. Regardless of that fact, the Commissio found that the rates for storage to the complainant there were not unduly prejudicial.

Now, the Examiner treats also with transit arrangements on sugar in his brief, in his proposed report. He also talks about barge-rail rates. It is a well known fact, and I think the record so shows, that the differentials on sugar between the *the* all-rail routes on the one hand and the barge-rail routes on the other, are generally on an agreed basis, that is, they are not on the basis of the formula.

Now, we can not see how Savannah can be prejudiced and New Orleans unduly preferred under any system of barge-rail rates. Savannah is on a dry land basis to some extent, except that Savannah does have the advantage of water competitive rates to a great portion of the territory where the competition from New Orleans played the greater part of the influence. But if we are going to accept the theory of Savannah that New Orleans is unduly preferred and Savannah is unduly prejudiced, because we have in effect from New Orleans barge-rail rates on sugar to points in the Southeast, while they must of necessity resort to a dry land basis, then I suppose on that theory all ports must of necessity have dry land rate structures and the water competitive influences do not enter into the picture.

But we are not asking here or in this proceeding for any [fol. 774] particular or any special treatment. We did except to the Examiner's proposed report with respect to the transit arrangements, but we were dealing with transit arrangements on all commodities. We are not asking for any special treatment on sugar. As a matter of fact, our only position so far in this proceeding—and I will say it

very frankly now—is that we feel that the Commission should require the rail lines to participate with the barge lines where the rail lines maintain transit arrangements.

There is no transit arrangement today on sugar from New Orleans to points in the Southeast. It follows the rail lines. There is no transit arrangement. Therefore, we can come before the Commission and ask you to require the rail lines to join with the barge lines in the maintenance of a transit arrangement. Anyway, a transit arrangement is local to the line that furnishes it. I am on sound ground when I say that.

Regardless of that fact, I will agree with what Mr. Belnap has said on pages 71 and 72 of his brief of exceptions where he discusses the principal cases that have been before the Commission with respect to the storage in transit of sugar. Those cases that have been discussed by Mr. Belnap are cases where the barge line came in and asked for transit arrangements where similar transit arrangements were not maintained by the rail lines. Therefore, we are not asking for anything special here.

[fol. 775] Another answer, I think, that could be made to Savannah's allegations of undue preference and prejudice, from the language of the Supreme Court in the Mecklen case, wherein the Supreme Court says this:

"It is therefore not within the province of the Commission to adjust rates either to equalize the cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition."

Now, that same answer could be made to the proposition that is going to be placed before the Commission by the Galveston-Houston interests. They allege that New Orleans is unduly preferred and Houston and Galveston are unduly prejudiced because we have in effect a system of barge-rail rates. Of course, Houston and Galveston do not have a system of barge-rail rates. Again I say that that is brought about due to the fact that the muddy waters of Old Man Mississippi flow by New Orleans and sometimes scare the life out of us in the springtime, but they are there just the same and they afford a highway.

There are differing conditions and under Section 3, as I understand it, conditions must be comparable, they must

be identical. We might have an advantage, but I do not say it is undue. I do not think so, anyway.

As I say, these adjustments have been born of factors that are present at New Orleans and are not present at the com-
[fol. 776] plaining points.

Aside from that, I do think that this decision of the Commission in Docket 23836 which involves the whole question of storage in transit at port under barge-rail rates to points in the Southeast are not controlling here. Conditions have changed. Remember the fact that Examiner referred to on page 40 of his proposed report, that that sugar case that the Savannah interests continually referred to was decided 16 years ago. I do not know what the record would show today with respect to the handling and the commercial conditions so far as surrounding the handling of sugar is concerned. During the war the sugar refineries had their particular territory to distribute in and those conditions exist to some extent today.

Thank you very much.

Argument of F. P. Aughnay

Mr. Aughnay: May it please the Commission, my name is Frank P. Aughnay. I am in charge of the Traffic Department of the North Dakota Public Service Commission. I am speaking on behalf of that organization and also interests in Minot.

North Dakota has participated in this proceeding since its inception and presented evidence in 1935, and at later dates, including the hearing held at Chicago, Illinois, in November, 1942. We also filed a brief in August, 1939; again in September, 1943; as well as exceptions to the Examiner's pro-
[fol. 777] posed report on January 28, 1947. We are not in disagreement with the Examiner's proposed report as far as he has gone. We think he should have gone further.

In our exceptions we pointed out, (1), that we excepted, that the findings in this proceeding be restricted to class and column rates and (2), the limiting of the number of key points in North Dakota with which he recommends differential under the all-rail class rates. After a very short statement I will get to the commodity rate feature in which we are particularly interested.

Since the inception of this case, that is, back in 1934, North Dakota, we have obtained through all rail class rates, to-

gether with exceptions to the classification from and to the south in Western-Southern Class Rates, 266 I. C. C. 497 and 231 I. C. C. 315. We also have through all-rail class rates between points in Southwestern Territory and North Dakota, which have been in effect for a number of years.

The first barge-rail or rail-barge-rail rates to North Dakota were established pursuant to the Commission's order in Docket No. 19017, Inland Waterways vs. Chicago Great Western, et al., with which was consolidated the complaint of the Fargo Chamber of Commerce, Docket No. 19132, reported at 129 I. C. C. 521. Fargo was the only North Dakota point on whose behalf evidence was offered in that proceeding and as a result thereof it was the only [fol. 778] point to which the Commission ordered reasonable joint rail-barge and rail-barge-rail rates to be published, the prescribed differentials to Fargo required being the same as the differentials applicable to the head of river navigation at the Twin Cities, Minnesota. Since that time some additional rates on the same differential basis were later extended to North Dakota points other than Fargo, but we do not have a complete line of such rates to and from all North Dakota points at the present time.

The head of barge or river transportation on the Mississippi River is at the Twin Cities of Minneapolis and St. Paul, Minnesota, to which a nine-foot channel is navigable. None of the navigable tributaries of the Mississippi River reach North Dakota, and the only way that North Dakota can enjoy any of the benefits of water transportation is through the maintenance of joint through routes and rates by the rail carriers and the barge lines.

North Dakota is located north and west of the Twin Cities, Minnesota, and can properly use barge service to a large extent from the lower Mississippi Valley or to that territory. The waterways were improved by the Federal Government at great public expense and we feel that some of the benefits of water transportation should be extended to points such as North Dakota if it is found to be economically justified, and that we should have the benefit of barge through and rail-barge-rail rates wherever practicable.

[fol. 779] In the proposed report to which North Dakota filed an exception January 28, 1947, the Examiner named but one key point in North Dakota, namely, Fargo, North Dakota, and that only in connection with class rate traffic

wherein certain differentials are shown via either Minneapolis or St. Paul, Minnesota, or St. Louis carry on on the lower river.

We feel that in order to grade the rates in an equitable manner that a number of other points in North Dakota should be designated as key points, namely, Grand Forks, Devils Lake, Minot, Williston and New Rockford, and four additional key points established on the Northern Pacific, namely, Jamestown, Bismarck, Dickinson and Beach, and one on the Milwaukee, namely Bowman.

The reason we have asked this is that we have a lot of difficulty, particularly in the 17,000, Part II, class rate case, and the original 17000, Part 7, grade rate case, wherein the Commission did not prescribe a large number of key points and we really found that the railroads were prone to take the full grade immediately west of the key point and did not grade them in an equitable manner. I think by the establishment of more key points to North Dakota and an admonishment from the Commission that they prescribe them equitably, we will be better off in that respect.

The Examiner in his proposed report practically dismisses, or I should say he does dismiss, the matter of com- [fol. 780] modity rates. Our principal evidence was in connection with the commodity rate structure to North Dakota. Our commodity rates generally from the South and Southwest are upon a combination of local rates over the Twin Cities, Minnesota, or such points as St. Louis, Missouri, as well as points along the Ohio River. The evidence developed by Witness Winter in his Exhibits 538 (a) to 547 (a), and Exhibit No. 4253 submitted at the last hearing showed that we were practically on a combination rate basis. In other words, as far as barge-rail rates, as well as all-rail rates, we had no reasonable through adjustment but were on a combination of some such point as the Twin Cities or the other points I have mentioned.

In our brief of August 30, 1939, we pointed out the numerous commodities used in North Dakota that are produced in the South or lower Mississippi Valley or are imported through the Gulf ports.

The import commodities that we use in North Dakota are sisal, of which there is a concentrated movement to Bismarck, North Dakota, and green coffee.

In our brief of August 30, 1939, we showed the rates on these commodities, including burlap bags and bagging-alcohol used for motor antifreeze, clean rice, oyster shells and sugar. We made a complete analysis of the rate structure and showed whether or not that was a combination basis and if we did have through rates on certain commodities.

[fol. 781] Now, for example, in connection with burlap bags and bagging, both the all-rail rates and the rail-barge rates are a full combination of locals over St. Paul. That is also true with alcohol use for antifreeze.

Upon green coffee certain points in North Dakota, including Fargo and Grand Forks on the eastern border, have rates less than the full combination over St. Paul. That is, both all-rail and rail-barge rates. To the territory in central and western North Dakota, a combination basis over St. Paul applies.

There is only one commodity, and that is oyster shells, on which we have a reasonable through all-rail rate basis of rates from New Orleans to North Dakota. This is where we do enjoy a reasonably related basis of rates on a commodity. That is, I am talking about all-rail and rail-barge.

In connection with sisal, which moves to Bismarck, North Dakota, this all moves barge-rail. There is no rail movement of that. At least, that was the evidence up to 1942.

It is a combination of 43 cents, which is the barge rate to Stillwater, plus 44½ cents beyond, or 87½ cents. A large quantity of sisal is used at the State Twine and Cordage Plant at Bismarck and it is also, of course, within the State of North Dakota.

Now, the commodities that we dealt with in our evidence are limited in number. There are only 7 or 8 commodities. [fol. 782] Specific treatment by the Commission should not prove to be too onerous a burden.

I might say that the details in connection with the proposed rates on these commodities are set out on pages 10 to 25 of our brief of August 30, 1939.

We proposed, for example, on sisal a rate of 66 cents to Bismarck, that is, barge-rail. That was based upon the spread in the column 32 rates over St. Paul, added to the Stillwater rate of 43 cents.

The adjustment with respect to the other commodities is relatively to the same and our proposals are relatively the same. It proved disappointing that after 13 years of litiga-

tion and extensive hearings the Commission adopted the Examiner's suggestion and dismissed from consideration here a reasonable basis of commodity rates.

Now, in connection with these particular commodities I have mentioned, they are all more adaptable to barge movements than some of the higher class articles that would move on class rates. In other words, you could moye sisal up the river to Stillwater in lots of 108 tons. That is where the barge rate applies, in a lot of 108 tons. We think the commodity rate feature of it should be given considerable attention by the Commission. We therefore urge the Commission, (1) to give consideration to the establishment of additional key points to points in North Dakota. (2) We [fol. 783] urge that the Commission do not dismiss consideration of the commodity rate adjustment in this proceeding. (3) We urge that the Commission give special consideration to the establishment of a reasonably related rate for barge-rail or rail-barge rates, particularly in connection with the commodities specifically dealt with in our evidence and testimony and briefs.

Thank you.

Commr. Lee: Mr. Porter.

ARGUMENT OF MR. ERNEST PORTER

Mr. Porter: May it please the Commission, my name is Ernest Porter. I am commerce counsel for the State of Iowa. I represent here the Iowa State Commerce Commission and the people of the State of Iowa.

This proceeding before the Commission has been in progress for more than a decade. It is now approaching the final stages, we hope. Two of my predecessors have participated in this matter, the Honorable John Lamar and the Honorable H. E. Davidson.

Evidence was presented at the Chicago hearing by witnesses for the Western Grocery Company, Marshalltown, Iowa, and by Mr. Harry Sundberg, who was traffic manager for the Chamber of Commerce of Cedar Rapids, Iowa, and who also is president of the Eastern Interior Iowa Industrial Association, which is comprised of commercial organizations and large shippers in eastern interior Iowa.

[fol. 784] Other Iowa cities, manufacturing interests and other industries introduced evidence generally in conjunc-

tion with the Mississippi Valley Association supporting retention and extension of through routes and joint rate arrangements. A brief was filed by Mr. Davidson in 1939.

In the interest of brevity, I shall merely call attention to it and add that before coming here for this argument I checked with several interested persons to determine if their respective interests in this matter were the same now as they were at earlier stages of the proceedings. I received affirmative assurances.

I have asked that there be placed before you a little excerpt from a book prepared by the Iowa Development Commission. These few pages deal with transportation in Iowa and on the next to the last page there is an illustration which shows the inland waterway system of the United States outlined in heavy black lines.

You will note that on that map Iowa is slightly shaded and that the inland waterways have been developed now along the eastern border of Iowa for its entire length, and on the western border of Iowa as far north as Sioux City, which is an active port at the present time. Some of that development has taken place since this proceeding began.

Iowa, lying as it does between these two rivers, which are navigable, is in a position to benefit greatly by joint rail-[fol. 785] barge rates and not to have the proper relationship between rates to interior cities in Iowa with the port cities would cause a considerable hardship on those inferior points.

Now, in the early days before railroads, these two rivers afforded transportation facilities to Iowa and much of the Mississippi Valley. About that time that Iowa became a State, the rivers were very important. About the beginning of the Civil War and in that period, the railroads came into the picture and developed rapidly, partly because of the aid given by the public to the development of railroads in the early days.

Iowa alone contributed 3,866,774 acres of its some 35½ million acres of land toward the establishment of these railroads. That is about ten percent. In addition to that, there were many other contributions to the building of the railroad industry in Iowa. These railroads did a magnificent job. They were speedier and they soon caused the water transportation to fade out almost to the vanishing point.

Congress, however, and the public generally have come to realize the economic importance for an adequate waterway system in this country and have undertaken the development and restoration of these facilities for arteries of transportation by the use of public funds.

You will readily see, as I pointed out before, that these two rivers are in a situation to serve Iowa's ports. Iowa [fol. 786] now has ports, I think, if I am not mistaken, at Burlington, Muscatine, and in the tri-city area of Davenport-Rock Island-Moline, and at Clinton, Iowa, with an oil or petroleum port facility at Bettendorf on the Mississippi, and of course there is a port at Omaha and Council Bluffs on the Missouri, and at Sioux City.

Those developments have been paid for, as I say, by public funds, to which the people of Iowa have made their fair contribution and we feel they are entitled to participate in those benefits by way of a joint barge-rail arrangement relating properly the rates to the interior cities with those port cities.

Commr. Mahaffie: Mr. Porter, have you participated in many railroad abandonment cases that came from Iowa?

Mr. Porter: Your Honor, perhaps you will recall that I have been here before this Commission on one or two occasions for that purpose; yes, sir.

Commr. Mahaffie: By any chance, have you checked what is said about the road system of Iowa in this pamphlet with what was reported to us in those abandonment cases?

Mr. Porter: Yes, sir; I have, but I call the Commission's attention to the fact that those road systems that are in that little pamphlet on transportation are State roads, paved roads, and they very seldom serve the same towns that the branch lines now serve. I think many of the towns [fol. 787] that are involved in railroad abandonments are not on this kind of highway, Your Honor.

Commr. Mahaffie: I was just reading what it says. One can travel to any part of the State and in any direction over Iowa paved roads. There is a surface road to every incorporated town in Iowa, according to the pamphlet.

Mr. Porter: Well, I would not quarrel with that.

Commr. Mahaffie: Do you think that checks pretty well with the evidence we have had in abandonment proceedings?

Mr. Porter: I call your attention to the fact that this item—perhaps I should have just torn out the page I wanted the Commissioners to see.

Commr. Mitchell: There is quite a difference, is there not, in the road situation in the northern part of the State and the southern part of the State?

Mr. Porter: I think Commissioner Mahaffie is kidding me a little bit. I might say that that is a publication put out by the Iowa Development Commission to entice industry into Iowa. I would not vouch for the truth or veracity of everything in it.

Commr. Mahaffie. The part you rely on is more reliable, I take it?

Mr. Porter: The map is all. I think that is all I had any reason to use here.

Commr. Aitchison: It seems to me that there were only [fol. 788] two points in the State of Iowa that were more than ten miles from a railroad.

Mr. Porter: That is possible.

Commr. Aitchison: Is that still true?

Mr. Porter: That could be true, Mr. Aitchison. There are places in southern Iowa where if you are more than—well, I was going to say a half mile or mile from a railroad, you were in trouble at certain times of the year, and I expect before the spring is over I will be back here arguging in another abandonment case and we will try to stick to the truth.

To get back to this matter we have before us here, Mr. Sundberg, I think, sized the thing up pretty well when he said that he was at the hearing because he was afraid to stay away. Much concerned was he about the economic changes that had taken place in the last few years that disrupted the relationship between interior points and the so-called port cities.

He said, too, in his testimony that he wanted to offset any cross examination by saying that the people of Iowa, and interior Iowa, especially, want their railroads to be kept there and we can not see how, as long as the connecting lines are to get their full division the same as if they were accepting freight from another railroad, they can be very much prejudiced by the continuation and the extension of through routes and joint rates.

"The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

In U. S. War Department v. A. & S. Railway Company, 92 I. C. C. 528, 547, the Commission said:

"Our conclusion upon this question of law, therefore, is that where the connecting rail lines participate from and [fol. 818] to the points in question in an all-rail through route and joint rate in which an intermediate rail carrier operating between the barge line's ports also participates, we have the power to require the establishment of a through route in connection with the barge line and to prescribe a joint rail-barge-rail rate which is differentially lower than the corresponding all-rail rate, provided the differential fairly reflects the lower cost and value of the barge line's service."

In Petroleum and Petroleum Products From California to Arizona, 241 I. C. C. 21, 42, the Commission, in discussing the various rules of rate-making in the Interstate Commerce Act, said:

"The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petroleum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity are of less importance."

There are many more cases along this line, but they are cited in our exceptions commencing at page 17.

In the light of these statements, which so clearly and [fol. 819] directly indicate that the important factor in these cases is the cost of service, it seems almost impos-

sible for anyone to come to the conclusion that the Commission in the past has regarded cost-of-service evidence as being immaterial, but that is exactly what the Examiner has proposed in this case and exactly what the barge lines want the Commission to do.

Except in this case the barge lines have always attempted to justify the differentials on the basis of the lower cost of barge service. The Examiner recognized this when he said, on sheet 30 of his proposed report, "That in the past the barge lines and their supporters have strongly asserted their ability to perform transportation at costs lower than those of the railroads."

Now, the Examiner referred to several cases, and we referred to several others in our exceptions, where the barge lines have contended that the differentials are justified on a relative cost-of-service basis. The Examiner, in the proposed report, refers to a statement in the report of the House Committee on Interstate and Foreign Commerce with respect to the enactment of the Denison Act, which stated that the Act would "aid in bringing about such through routes and joint rates and fair division of joint rates as will afford to the people of a large part of the country the economies of cheaper transportation by water."

We are going to refer to the Mechling case again some-[fol. 820] what later, but we would like to call your attention to that case now. Mr. Justice Black, who delivered the opinion of the Court, referred many, many times to such things as "inherently cheaper water transportation," "the inherent advantages of barge transportation, lower cost of equipment, operation, and therefore service," "cheap barge transportation," "the inherent advantage of the lower cost of barge carriers," "the inherent advantages of cheaper barge transportation which Congress intended to guarantee to shippers."

The Court also referred in footnotes to that decision, to statements made by Senators and Representatives in the debates on the Transportation Act of 1940, all of which indicate a belief that water transportation is cheaper than rail transportation.

It is absolutely impossible for any impartial person to read the Mechling decision and not come to the conclusion

that what the Supreme Court thought it was protecting in that case was the assumed inherent advantage of lower cost transportation by barge.

Now that that assumption has been proved false in this case, the Commission should find differentials are not justified.

Now, the Examiner says that the history of the barge rates shows clearly they have always rested mainly on a comparison of value rather than of cost of service. If he means by that statement that the differentials have been [fol. 821] justified on a basis of a comparison of value rather than cost, and we think he must, from the conclusion he arrived at, be mistaken. Nothing could be further from the truth.

The case we have cited completely dispel any such notion. We previously stated we do not contend that value of service should not be taken into consideration in the fixing of differentials. The Commission has often considered the value of the service in these cases but chiefly for the purpose of fixing the amount of the differentials.

When lower cost of service and lower value of service go hand in hand, the Commission has often referred to the differentials as being based both on the lower cost and on the lower value. However, it is clear from the Commission's own words that the lower cost of service is regarded as the prime essential element in the justification of the differential.

Lower value of service may also be an essential element in such a justification. Cost-of-service alone probably is not sufficient. Otherwise, the differentials from this case would be fixed in favor of the railroads.

Commr. Aitchison: Do you want a case where the Commission held to the contrary?

Mr. Spencer: Yes, sir.

Commr. Aitchison: The Columbia River Basin case, the final one.

Commr. Alldredge: Mr. Spencer, I have looked through [fol. 822] your brief carefully, at the pages you cited, and the only comparison I find here is all-rail costs compared to water-rail, and rail-water costs.

Mr. Spencer: There is some discussion of the port-to-port movements on page 92 of the brief on further hearing, and also there is a discussion of that point in the Exhibits—Dr. Edwards' Exhibits 1350, 1351, 1352, and 1353.

I would only like to say to Mr. Commissioner Aitchison that if the Commission held in that case—I do not know the facts involved in that case, or whether they are consistent with the issues here.

Commr. Aitchison: What it did was reverse itself and provide equalization between ports on Puget Sound and ports on the Columbia River.

Mr. Spencer: There may be cases which justify something of that sort, but certainly that is not present in this case.

We think that if lower cost of service is not present there is no need to consider the other factors here because none of them by themselves, or in combination with any other factors, could justify a differential. We do not have the assumed lower cost of service going hand in hand with the lower value of service. The Commission here has been faced with a problem of deciding whether an inferior service, which is also the higher-cost service, is entitled to a differential in its favor. In such a case the Commis- [fol. 823] sion has to decide whether the lower cost of service is an essential prerequisite to the prescription of a differential under section 307(d) or whether such a factor is completely immaterial, as the barge lines argue. There is no way of reconciling those two positions, and no way of assigning some weight to cost of service and some weight to value of service.

If the Commission holds that differentials are justified in favor of the joint routes, it can do so only by completely ignoring the cost evidence. If it holds that lower cost of service is essential to the prescription of differentials, it cannot find such differentials to be justified here. In the light of its past decisions, as well as in the light of reason, it should adopt the latter view.

We maintain that the Commission cannot and should not require the rail carriers to maintain rates for the protection of the traffic of their competitors. As an academic proposition that appears to be admitted by counsel for the barge lines.

However, we would like to say a few words with respect to its application to this particular case.

Commr. Alldredge: You have an interesting observation on page 93 of your brief of October 4, in which you say, "There is no justification whatever for adding to rail cost such factors as passenger deficits," and so forth.

Mr. Spencer: Yes, sir. We referred to that briefly yesterday afternoon.

[fol. 824] Commr. Alldredge: Your principals have not taken that position in some of these other cases, have they?

Mr. Spencer: We feel that should not be included because there is no other corresponding element on the other side of the picture. When you develop cost of handling traffic over the all-rail routes what you are comparing is the cost of handling this traffic with the cost that the joint routes have of handling this traffic, and therefore there is no logical reason for including a passenger deficit.

Commr. Aitchison: In other words, as we used to say out on the prairies, in differentiating these cases "it is another forty"?

Mr. Spencer: That is right.

The evidence is so overwhelming in our favor it is unimportant. We think the Commission's Cost Section is wrong on that point. Even if they are right, however, it is in our favor anyway. Now, the barge lines frankly state that the keystone of their position is the existing rail rate structure. They say this must be accepted as static. The Examiner has adopted their theory. He states at sheet 31 that it is believed that the railroad class rates are on a sufficiently high level in most instances to justify differentials for barge-rail rates on this theory.

The first question which would occur to anyone in considering this theory is whether the railroads can be re-

[fol. 825] quired to keep their rates on the existing structure.

In other words, can they be required to maintain their rates for the purpose of protecting their competitors.

This question occurred to the Examiner, too. On sheet 31 he says: "The question whether the railroads can or should be required to maintain rates sufficiently high to allow differentials for barge-rail rates, touched on in the railroads' brief, cannot be answered in this proceeding. The answer seems to depend on the role to be assigned to competition in rate making of the future."

Commr. Miller: If you did put your rates out to your fully distributed cost, the barge lines could not handle this as they have, at a profit.

Mr. Spencer: That is exactly what we want the Commission to understand in this case. We see no reason for

keeping us from putting our rates down if we have to, to meet the competition.

Commr. Miller: I do not think anyone contends you cannot put them down.

Commr. Mitchell: Can you put your rates down and operate at a profit?

Mr. Spencer: Yes.

Commr. Mitchell: Then do you not need no increase?

Mr. Spencer: The rail rate structure, of course, takes into consideration value of service to the shipper. The Commission in many cases has held that if one competitor [fol. 826] is entitled to make rates on an out-of-pocket-cost theory another mode of transportation is entitled to that same right. If the lower cost agency of transportation maintains rates on the basis of fully allocated costs, then its competitor should not be entitled to maintain rates on an out-of-pocket-cost theory.

We think that same thing applies in this case.

Commr. Aitchison: Do you apply that in Fourth Section cases?

Mr. Spencer: I do not believe that is inconsistent with Fourth Section cases.

Of course in my case there are many instances in the rate structure and transportation system where traffic does not move in the most economical manner.

Commr. Mitchell: Do you mean even on railroads?

Mr. Spencer: Yes, even on railroads. Now competition ordinarily will help to make it move in the most economical manner, but the question here simply is whether or not the Commission is going to force it to move in a uneconomical manner.

Now, we say this is a minimum rate case, and the barge lines attempt to distinguish all these cases on the ground that they involved the prescription of minimum rates between competing forms of transportation. They say that any order entered here would not be a minimum order or minimum rate order. While this case does not involve the prescription of many reasonable rates, if any order which prevents a carrier from meeting the rates of its competitor is not in effect a minimum rate order we would [fol. 827] like to know what it is.

If you admit the railroads have the right to meet this competition, this would tend to force all the rates down

to the cost level. That would result in a breakdown of the rate structure and what would be the unwarranted dissipation of revenue needed of the transportation systems of the country.

Commr. Mitchell: If your rates are reduced, then your rates would be such that the water carriers, according to your cost figures, could not possibly carry it and make any money.

Mr. Spencer: That is perfectly true, and if the Commission decides that these differentials should be fixed, or that they are entitled to be fixed on the barge line theory of the case, we hope that in its decision the Commission will make that point clear, but what we are afraid is that they will fix the differentials and academically admit that we have the right to meet competition and then just take that right away from us for all practical purposgs.

The barge lines say that we have the right to do that. They admit that, and they have to admit that. That is clearly the law.

Commr. Miller: Is that statute such that you think we have to make differentials or make a joint rate with some other form—would that equally apply to the statute?

Mr. Spencer: I do not understand what you mean, sir.

Commr. Miller: Do we have to fix differentials or could [fol. 828] we fix a formula for making joint rates without specifying specific differentials?

Mr. Spencer: I do not think you have to specify specific differentials. You could fix a formula.

Commr. Miller: It would automatically make a differential?

Mr. Spencer: Provided you do not fix it in such a way that if we lowered the rate the differential goes right down with it. That is a minimum rate order which prevents us from making that competition notice us. That was true, I think, in Ex Parte 96 formula, and similar formulae.

Commr. Miller: Even if the differential would go down with it it would make the water rates so low they could not possibly make any money out of it, if this record is correct.

Mr. Spencer: We do not think they are making any money now, for one thing.

Commr. Miller: You mean they are not making any money out of this particular traffic because some of the barge

lines—the Mississippi Valley, for instance, is manifestly making money.

Mr. Spencer: Surely, but they do not handle the traffic. It sounds so easy theoretically and academically but as a practical manner it is practically impossible to work out on that basis; it is economically unjustified and we do not think the Commission ought to do that sort of thing. They rely, of course, upon the rate structure as a whole to prevent us from making any individual competitive reductions, and that might be true, as far as the class rates [fol. 829] are concerned, that if the differentials are fixed we might not be able to meet that. It might be better for us to completely forego that traffic. That certainly would not be true in the case of the commodity rate. In the case of a commodity rate we could meet that competition and if our rates went down to that point then even if under this theory that they have the differential would not be justified.

However, we think it is absolutely indefensible to require the railroads to maintain a rate structure based upon the value of service so that the commodities most able to pay will contribute more to the transportation burden *and* commodities less able to pay and then force the rail carriers into a joint structure which is based on the theory of cost.

Now, it is economically unjustified to make us reduce our rates to the lowest possible level, just for the purpose of destroying the differential.

The Commission said in Petroleum Between Washington, Oregon, Idaho, and Montana, 234 I. C. C. 609, at page 637, that they were given the power to fix minimum rates, to prevent the destructive competition in transportation agencies, and they said that their exercise of that policy is not done if they allow the rates to gravitate to the lowest possible level.

Commr. Alldredge: We had a sharp disagreement in that case. The rail carriers did not want to do what the Commission suggested. Have they changed their minds about that [fol. 830] now? Do you think the Commission was wise in that decision?

Mr. Spencer: Well, that sounds all right to me, right there.

I think Commissioner Eastman, in his concurring opinion in Naval Stores from Mississippi to Gulf ports, 235 I. C. C. 723, when he said:

"If we are to promote the use of the mode of transportation which is economically best fitted for the service in question, we ought not to shy away in clear cases from prescribing the differences in rates which the facts justify and which will accomplish that result.

"Having determined what relation in rates, be it parity or otherwise, is warranted by the economic facts, there is no sound reason, if we are to stabilize and improve financial conditions in transportation, why that relation should necessarily be established on the lowest possible level. In determining what the level should be, also, we are fully justified in taking into consideration the value of the service, or what the traffic can fairly bear."

In this case, if we assume that the rail rates under consideration were on a cost basis, then it is admitted that the differentials would not be justified under the Examiner's theory.

Commr. Alldredge: Does the report or the record show what percentage of this joint-water-rail business is com- [fol. 831] petitive with all-rail business?

Mr. Spencer: I do not believe so.

Commr. Alldredge: It would not be competitive in all instances, would it?

Mr. Spencer: I do not know.

Commr. Aldredge: Suppose a shipment moved from New Orleans to Chicago by Evansville in the C. & E. I., could the C. & E. I. say that that was competitive with it, in any sense of the word?

Mr. Spencer: You say if the shipment moved how from New Orleans to Chicago?

Commr. Alldredge: By boat or barge to Evansville and then the C. & E. I. to Chicago. Could the C. & E. I. say that is taking business away from it in any way?

Mr. Spencer: No, the C. & E. I. could not say that but if you take the case where it moves from New Orleans to Cairo by barge, and then over the Illinois Central, the Illinois Central can say it is competitive.

We think if these things are not justified at the cost level there is no sound legal or economic theory which would justify them simply because the rail rates were on a basis which also took into account the value of the service to the shipper.

The Examiner suggests that the most important principle

which the Commission has laid down in barge-rail rate cases is that: "So long as the barge line bears the burden of the [fol. 832] differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount."

He hastens to add, of course, that this does not make the barge line the arbiter of the differentials, although it seems to us that is exactly what he has done.

Now, let us see what safeguards or standards he proposes. He says that presumably a barge line would not accept the burden of a differential without determining whether its division of the joint rate would cover its operating costs.

He says that, if it performs the service at less than cost that would be an unfair and destructive competitive practice. He further explains that, in this connection, he, of course, means fully allocated and not out-of-pocket costs.

Mr. Ames referred to this as being a very statesmanlike statement. It may be, but it is certainly very unrealistic. The most obvious thing wrong with it is the special position of the Federal Barge Lines. For years this operation as a whole has not met its operating expenses. As an agency of the Federal Government it can and does go on year after year operating at a loss, and when it needs more money Congress can provide it out of the public treasury.

Right at this time it is asking Congress for $18,000,000 more capital.

The safeguard suggested by the Examiner is no safeguard [fol. 833] at all. An excellent illustration of this is the Warrior River Division operated by the Federal Barge Lines. The Examiner says: "Clearly they have no hope of putting the Warrior service on a paying basis, although there seems to be no present intention of discontinuing that operation."

Thus, on the Warrior River Division, the Federal Barge Lines is handling traffic at less than its cost of operation. It has always handled traffic at less than its cost of operation, and there is no prospect that it will ever secure sufficient revenues to cover its operating costs.

This operation has had an extremely deleterious effect on the revenues of the rail carriers in that area. The barge line did not develop any tonnage but diverted that tonnage from subsidiaries of the Southern Railway.

The rail lines from which the traffic was diverted could have handled the traffic without straining their facilities or

disrupting their service, and with very little increase in expense, and could still have made money on the traffic. But the barge line diverted the traffic and lost money.

So here we have a double loss. The railroads lost money and the barge lines lost money.

On page 43 of its reply to exceptions, dated August 1, 1947, Federal admits that the Warrior Division operation is not in the development stage and should stand on its own feet. This, according to its own theory, is an admission that [fol. 834] there should be no differentials in connection with this operation. Yet Federal says:

"Federal believes, however, that differential rates and routes in connection with the Warrior River Division should be continued until such time as that division is disposed of under existing legislation or under the terms of proposed legislation."

We submit that that gives small consideration to the rail carriers' rights in the matter. If these differentials are not justified, as they most clearly are not, even under their theory of the case, they should be stopped immediately. The Federal Barge Lines does not stand in any different position under the Interstate Commerce Act from that of a private barge line.

As to the Missouri River operations, Federal contends that those operations should be treated differently from other barge operations since they are still in the development stage. The Examiner says: "In this experimental period, Federal should not be compelled to accept a lower level of joint rates than it considers justified."

Here is another operation carried on at a loss by a Government agency, and we submit there is no legal basis for continuing the differentials just as an experiment. If the people want to experiment with barge transportation on the inland waterways, that experiment should be financed by a direct subsidy at the expense of the general taxpayer [fol. 835] and not financed by the diversion of traffic from the carriers which handle it most economically.

Now, just a brief comment with respect to the Examiner's theory that the Barge Line Division of the joint rate must cover its fully allocated costs.

There is naturally a wide field between out-of-pocket and fully allocated costs in which the barge lines would find it much more profitable to carry traffic at less than the fully allocated cost rather than not to carry the traffic at all.

This, according to the Examiner's theory, would be an unfair and destructive competitive practice. Assuming that such a distinction is proper, we hope that there are no illusions about the practical difficulties involved in stopping a situation of that kind.

We have been told that section 3(4) of the Interstate Commerce Act requires the railroads to enter into these differential rates with the barge lines so long as the railroad obtains the same division from the barge line that it obtains from another railroad. In other words, they say that if the railroad gets this same division it has no concern with the rate or any of the other factors involved. This interpretation of section 3(4) of the Act is clearly erroneous. That section requires that carriers subject to the Act "shall not discriminate in their rates, fares, and charges between connecting lines." There is nothing in the Act which says that [fol. 836] the barge lines shall receive special or preferred treatment under this section of the Act. The National Transportation Policy says there shall be fair and impartial regulation of all modes of transportation. If it is proper to apply that principle in favor of a barge line, we know of no reason why it would not be equally proper to apply it in favor of another railroad.

I want to illustrate that situation for you: The Illinois Central runs from Chicago to St. Louis. At St. Louis it connects with lines which go directly to Dallas, Texas. The direct line is the Missouri Pacific and Texas Pacific. There is also a circuitous route from St. Louis to Dallas over the Rock Island. If we assume that a rate of $1.50 applies over this route, that the Illinois Central Division is 50 cents and the division down here is $1. The Rock Island comes to the Illinois Central and says, "We have a circuitous route. We cannot compete for this traffic with the direct line. We must have a differential in our favor. Otherwise, the shippers will not ship over our route. We are willing to take 80 cents. That will make the rate $1.30. That will allow us to get some of this traffic."

They say, "You cannot object to this because you are getting the same 50 cents from us that you would get from the direct route." That is exactly what the barge line theory in this case amounts to. That is true in this particular case, as far as the monetary unit of the Illinois Central [fol. 837] is concerned. It would make no difference at all.

However, what about the interests of this portion of the

route? They are deprived of their inherent advantage of having a direct route. Further than that you can see what would happen to the rate structure if anything of that sort were permitted. That is exactly what they ask in this case and there is no reason either for allowing this sort of thing to go on, and then allowing the direct lines to meet it, and driving the rate structure down to the lowest possible point, or for letting them have a lower rate over that route than over the direct route.

Commr. Aitchison: Have you not drawn an accurate picture of the Canadian differential routes there?

Mr. Spencer: I do not know, sir.

Now, we will take another illustration: The Illinois Central runs from Chicago to New Orleans. It has some routes through Cairo, with the G. M. & O. Now, we will say this rate over this route is $1. The Illinois Central handles it all the way and collects one dollar. If the G. M. & O. could collect a rate over that route its division would be 50 cents. Now, the G. M. & O. can solicit traffic over that route and if it can obtain the traffic it can handle it, but it is an equality of rates and the Illinois Central can compete at equality of rates with the G. M. & O., and thus obtain the advantage of its short route and its faster service.

[fol. 838] Commr. Mahaffie: Has any change in that respect been made since the G. M. & O. acquired the Alton?

Mr. Spencer: I do not know, sir.

The barge lines come along and say, "We will shrink your share to 30 cents. You have no objection because you still get the same." However, in this case the Illinois Central is deprived of the complete through haul and a chance to earn the revenue of $1, in addition to which the route in connection with the G. M. & O. may be not other than the barge lines, and they are discriminated against.

We do not think the law means that at all. We do not think the Mechling case means that at all.

Commr. Aitchison: I asked you if you did not have a pretty accurate picture of the Canadian situation. In 8 I. C. C. 71 the Commission described the differentials as being in essence a device for the distribution of traffic. The purpose is to enable a line to participate in traffic which it cannot obtain if it were compelled to compete at the same rate as its rivals.

Is that not what you had on the board there?

Mr. Spencer: It may be so, but I am not familiar with that situation.

Now, in the Mechling case, which the barge lines rely upon for their interpretation of this section of the Act—that is Interstate Commerce Commission v. Mechling, 330 U. S. 567, I do not find in that case any indication that the Commis- [fol. 839] sion had divisions under consideration or were considering that particular way of making rates.

At page 579 of the decision, the Court said: "It has declared in unmistakable terms that the inherent advantage of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with shippers who do not have access to barge service, or to protect the railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the inherent advantage of barge transportation in whole or in part."

We pointed out previously that we thought the Court in that case was attempting to protect and assume inherent advantage. All we ask in this case is that they apply the same general principles to us as the Court was applying in that case. There is no inherent advantage for the barge lines to be protected in this case.

Up to this point we have talked about this division theory of the barge lines, on the assumption that it was exactly what it has been described to be, but that is not the case. If our understanding of this is correct, the Federal Barge Lines' formula does not even attempt to allow the rail carriers the same actual divisions that they would [fol. 840] receive on this traffic. What they have tried to do, so they say, was to allow the rail lines the same revenue as would be provided them by a so-called normal level of all-rail rates, equitably divided between the rail carriers.

Now, to justify this formula they presented a very long and complicated revenue formula. Even if I had time I could not discuss it here because I do not understand the formula. One of our witnesses who discussed this formula at one of the hearings in this case said it took him 45 days of being locked in his office to discover just what they had even done on that formula. The formula makes so many

fictitious inflations and deflations and corrections of one sort or another that it is worthless.

We criticized that formula at the New Orleans hearing and showed that when the necessary corrections in that formula were made that it did not even justify a differential on the basis of their own formula. This testimony was put into the record by Witness Butler at pages 13103 to 13139, and by Witness Leola at pages 13000 and 13001.

We think the question of the system of differentials proposed by the Examiner is an extremely important point, and that this particular evidence should be thoroughly studied and analyzed by the Commission before this case is decided.

The first thing to be said about the differentials which the Examiner actually proposed in the case is that they [fol. 841] cannot be really called a system of differentials because it is impossible to discover any formula or plan upon which they have been constructed. He *does* that they were based essentially upon the proposal of the Federa-Barge Lines. Now, the Federal Barge Lines did have a formula of some sort for constructing these differentials, but as far as we are concerned that also is impossible to understand.

The Examiner says that the differentials rest largely on judgment which we suppose means in the final analysis someone has to make up his mind what the differentials should be. He discarded the Ex Parte 96 formula, although he admits that "The circuity and relative service restrictions in the formula rested on sound principles."

In our exceptions we devoted considerable space to an attempt to analyze these differentials which the Examiner proposed, and we included several appendices showing the results of such analysis. We criticized the differentials because of their departure from sound principles of rate-making.

Now, as I have said, the Examiner set up a completely new system of differentials. The system of differentials does not appear—at least to us—to make any attempt to reflect in any substantial degree the so-called economy of the barge transportation—even proved or assumed. It is a completely new system of differentials, built apparently on the theory that the barge lines are entitled to participate [fol. 842] in a system of rail-barge rates.

We pointed out in our exceptions how the Examiner had proposed greater differentials for shorter water hauls and for longer water hauls, and how he had proposed the same differentials for greatly varying water hauls, which does not seem to us to give recognition to the element of economy in the barge service.

For example, he proposed a differential of 24 cents for 41 different water hauls ranging from 229 to 1,828 miles. The Examiner apparently adopted the Federal's grouping. The Federal proposed in some cases extremely large zones, including as many as 94 all-rail class rate groups, throughout which the differential would be the same.

Then in our opinion, at least, he picked key points in these zones where the differential would be the greatest, and then applied it to a very large territory which, under their formula, as we understand it, would not have justified anywhere near that differential. He even proposed differentials where the short line distance by rail to and from the ports of interchange would exceed the short-line rail distances from origin to destination. In other words, he proposes to make differential rail-barge rates where the traffic is farther by rail from its destination after it has been hauled by the barge line than it was at its origin.

I want to illustrate that situation, also: He proposed a differential of 8 cents, I believe it was, on traffic from [fol. 843] Helena, Ark., moving by barge to Memphis, Tenn., and then by rail, to Joplin, Mo.

After the barge lines had hauled it from Helena to Memphis, it is 10 miles farther away from Joplin than it was when it started. It does not seem to us that in that sort of a situation you can say that the barge lines have proved their economy of service, or that they have contributed anything to the transportation picture.

Chairman Lee: However, can you tell us how far Helena is from Memphis?

Mr. Spencer: It is about 80 miles. It is a very short haul, and I might say in this case that there are many, many differentials proposed for extremely short water hauls, where there just could not be any possible justification for a differential on the basis of economy of service.

Now, Federal admitted in its reply exceptions, page 118, that there should not be any differential via this route. There were other situations of that kind. There were a

We want low cost transportation into and out of Iowa. [fol. 789] We think it is good for Iowa and we think it is good for the country generally, but I think even paramount to that we want the proper relationship maintained between the interior Iowa cities and thanks to the Iowa Industrial Commission and others, some of those cities are becoming quite industrialized. Waterloo, for instance, and Des Moines, and Mason City.

Commr. Mitchell: What about Fort Dodge?

Mr. Porter: Yes, Fort Dodge. Even if it were not true, I would be very tactless not to mention Fort Dodge, Your Honor. These cities are developing rapidly industrially and they need the reflected benefits of joint barge-rail rates with a reasonable relationship maintained between those interior points and the so-called port cities on the river.

I think that about covers what I had to say. I would like to just re-emphasize the fact that the work of making these rivers navigable and maintaining them in that condition is paid for by public funds. That is the circumstance that is deplored by the rail carriers, but when the vast subsidies to the railroads in the early days are taken into consideration, the railroads really have little of which to complain. It would be more deplorable, it seems to us, if the Iowa people living between these two great waterways, to the improvement of which they have contributed their share, should be deprived of the benefits of water transportation that can only be afforded by joint rates and through routes maintaining the proper relationship [fol. 790] between the interior cities and the port cities.

Thank you very much, gentlemen.

Commr. Lee: Mr. Spencer.

Argument of Mr. Harold E. Spencer

Mr. Spencer: May it please the Commission, I appear in this proceeding on behalf of the rail carriers.

We believe that the Commission's power to prescribe differentials in this proceeding rests upon Section 307 (b) of the Interstate Commerce Act. The pertinent part of that section reads as follows:

"In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be

justified between all-rail rates and the joint rates in connection with such common carrier by water."

The fundamental legal question presented for decision by the Commission in this case is: What constitutes justification for the differentials referred to in Section 307 (d) of the Act?

The railroad respondents take the position that no differentials are justified in favor of the joint rail-barge routes—and I include in that term rail-barge, barge-rail, and railroad-barge-rail routes—unless there is a showing that the cost of transporting traffic via such rail-barge routes [fol. 791] is less than the cost of transporting the same traffic via the corresponding all-rail routes under which a differential is sought.

We do not contend that the Commission should not take into consideration the value of the rail-barge service or other proper rate-making factors in determining whether there should be a differential. But we do content that the one factor which is essential to support the prescription of a differential via the joint rail-barge routes is lower cost of service via those routes. If that factor is not present, all the other factors go for naught.

Although these differentials have been in effect for many years, this is the first time the Commission has been called upon to decide what constitutes justification for them. We might say that up to the present time the justification for the differentials has merely been assumed.

The decision of the Commission, construing for the first time this important provision of the Act, will mark out an important part of the pattern of regulation of these competing forms of transportation. It is of the greatest importance, therefore, that the Commission's decision be firmly founded in law and adequately based on sound economic principles. We believe that our position in this case meets those tests and that the position of the barge lines does not.

Before dealing with the legal and economic principles [fol. 792] applicable to this case, it is appropriate that we discuss the cost evidence here presented to the Commission and point out what that evidence shows, and then explain how the legal and economic principles should be applied in the light of that evidence.

This argument will, therefore, be devoted to the following eight propositions:

1. Traffic can be handled more cheaply over the all-rail routes than over the joint rail-barge routes.

2. Adherence to the National Transportation Policy requires that no differentials should be prescribed in favor of the joint rail-barge routes without a showing of lesser cost of service via that route. Relative cost of service is the only basis for differentials which will preserve the inherent advantages of each mode of transportation, foster sound economic conditions in transportation, and prevent undue preferences and advantages in rates.

3. The decisions of this Commission are ample precedent for holding that there should be no differentials in the absence of a lower cost of service via the joint rail-barge routes. That factor has always been regarded as essential to such a differential.

4. The Commission cannot and should not require the rail-carriers to maintain all-rail rates for the protection of the more expensive rail-barge routes.

[fol. 793] 5. The willingness of the barge lines to bear the burden of the differential is neither a sound nor practical reason for the prescription of such differentials.

6. Section 3(4) of the Act does not require the railroads to enter into differential rates on the basis sought by the barge lines.

7. The differentials proposed by the Examiner show how impossible it is to construct an intelligent and practical system of differentials when there is no sound basis for them.

8. The question of transit should not be considered in this proceeding.

The Examiner finds that the cost of transporting traffic is cheaper via the all-rail routes than via the joint rail-barge routes. This finding is amply supported by an overwhelming mass of cost evidence.

Mr. Behap said this morning, I believe, that the Examiner did not make that finding. He merely said that is

what the Cost Section said, but we regard that as a finding on the part of the Examiner. This finding is amply supported by an overwhelming mass of cost evidence.

Commr. Splawn: In his summary of findings at the last, did he make that finding?

Mr. Spencer: No, sir. He said, as I recall, that it appeared that the railroads had the advantage in the matter of cost. That was in the body of the report, however, and [fol. 794] not in the formal findings.

The cost studies presented in this case are very extensive and detailed. They were all subjected to the careful scrutiny of the cost section of the Commission's Bureau of Transport Economics and Statistics, and the results of the Cost Section's restatement are shown in the Examiner's proposed report.

One of the cost studies presented by the railroads, known as the Vivian study, covered 777 carloads of 18,907 tons of traffic, which was all the traffic interchanged by the railroads with the Federal Barge Lines and Mississippi Valley Barge Line in selected weeks from June to October 1933, and July to September 1935, at twelve Mississippi and Ohio River ports, one week being assigned to each port.

Another of these studies, known as the Lyrla study, pertained to 963 carloads containing a total of 24,959 tons interchanged between the Federal Barge Lines and the Illinois Central Railroad in April, August, and November of 1936. Studies similar to the Lyrla study were also presented by the Louisville and Nashville Railroad Company and the Southern Railway Company.

These studies were made for the purpose of comparing the cost of handling actual joint rail-barge traffic with the cost of handling the same traffic if it had moved all-rail. The method adopted was to develop the aggregate expenses incurred in handling the joint rail-barge traffic [fol. 795] as it actually moved and to compare those expenses with the expenses that would have been incurred if that same traffic had moved all-rail.

The unit costs of handling the traffic on the rails and barge lines were developed. These unit costs were then applied to the actual traffic handled via the joint rail-barge routes to determine the total cost of handling that traffic. This traffic was then rerouted from origin to destination via the logical all-rail routes, and the total cost determined

for such a movement. These studies showed without question that the cost of transporting traffic is cheaper over the all-rail routes than over the joint rail-barge routes.

The barge lines also presented exhaustive studies showing the cost of transportation by barge but made no comparisons between the all-rail routes and the rail-barge routes.

All of these studies were referred for study to the Cost Section of the Commission's Bureau of Transport Economics and Statistics. That section made many more refinements in the studies and made some adjustments for what it considered to be deficiencies in the studies.

Commr. Aitchison: How did their studies get into the record?

Mr. Spencer: They were introduced into the record by Dr. Edwards, sir.

Commr. Aitchison: As a witness?

[fol. 796] Mr. Spencer: As a witness in the case.

It then prepared a restatement of the Lyrla and Vivian exhibits, which showed that the aggregate cost of handling the joint traffic was greater than the cost would have been if the traffic had moved all-rail.

The Cost Section then carried its analysis of the cost data somewhat further. While the restatement of the various studies, that is, the Lyrla and Vivian studies, showed that the total cost of handling the joint rail-barge traffic was greater than the total cost that would have been incurred if the traffic had moved all-rail, it did not indicate the relative cost advantages which each movement might have depending upon such factors as length of water haul, length of rail haul, commodity loading characteristics, etc.

Commr. Splawn: In that computation of the costs of the joint haul, did your witnesses count as part of the rail cost the two-thirds indirect costs which are constant, even though the traffic moved by water part of the distance? That is, did they count it for that distance that the traffic moved by water in computing the joint costs? What is the rail cost augmented by the two-thirds constant cost which remained after the traffic was delivered?

Mr. Spencer: I am sorry, sir; I do not understand that question.

Commr. Splawn: I will get our cost people to figure it out. [fol. 797] Commissioner Aitchison says if there are witnesses, it is better than that.

As I understand, these cost accountants of the Commission were merely called in order that all parties might know exactly what they might say to us about this cost data. That having been accomplished and they having been cross examined on their analyses, is there any party here who objects to our further conferring with these cost analysts as to the meaning of these data?

Mr. Spencer: The Commission's cost analysts?

Commr. Splawn: Yes.

Mr. Spencer: No, sir; we do not object.

Commr. Splawn: Does anyone object?

Very well, I shall ask them a question, then.

Mr. Spencer: To provide such information the Cost Section computed the cost of handling traffic over a wide variety of assumed or so-called "constructed" joint rail-barge and all-rail routes.

The table which appears on sheet 18 of the proposed report illustrates the type of information developed by this procedure. This table compares the cost of handling manufactures and miscellaneous freight between the points shown. The costs include a 4 percent return on investment. The cost of the water movement includes in addition to line-haul expenses and terminal absorptions the expense [fol. 798] for handling traffic between dock and barge at one terminal and of handling between barge and car at the port of interchange. The rail costs include the line-haul expense and terminal handling at points of origin and destination.

This table shows that, for the eleven illustrated movements, the rail lines had the cost advantage in all but three movements just considering the port-to-port movement alone. In other words, except in these three instances, without even including any portion of the rail haul of the joint rail-barge movement, the cost of transporting the traffic just between the ports is cheaper via the all-rail route than via the barge route. This advantage for the rail lines is due to the higher terminal costs of the barge lines and the circuity of the river itself.

The three movements in which the barge line had the advantage in the port-to-port movement were between New

Orleans and Memphis, New Orleans and Cairo, and New Orleans and East St. Louis. Now when the rail portion of the joint route is added to the port-to-port movement and that rail portion reaches only 100 miles, the cost advantage lies with the all-rail route in every instance except between New Orleans and East St. Louis, and the barge line advantage in that movement disappears when the rail portion of the movement reaches slightly more than 500 miles.

In restating the railroads' cost studies and in comparing [fol. 799] the costs via the "constructed" movements, the cost section included in the rail costs an allowance for return on investment, an allowance for passenger deficit and an adjustment for normal maintenance on the Illinois Central. For reasons which we stated in our brief and exceptions, we believe such adjustments are erroneous and unduly inflate the rail costs, but it is not necessary to argue here the propriety of those adjustments because even with those adjustments the cost section's exhibits show that the cost advantage clearly lies with the all-rail routes.

Commr. Miller: Is there anything in the record to show the difference of costs in the rails of switching a car to interchange at the port and what it costs to interchange a car between rails?

Mr. Spencer: There is, I believe, Mr. Commissioner, but I do not have the reference right now. I will try to have it in the morning.

Commr. Miller: All right.

Mr. Spencer: The barge lines have criticized the cost studies in several respects. It is not necessary to discuss those criticisms here in detail since they have been dealt with at length in the briefs and exceptions and have been considered by the Cost Section, which has apparently found that they are without merit. We do wish, however, to discuss those criticisms in a general way and to deal with [fol. 800] one or two of them in particular.

It should be borne in mind that the rail cost studies do not purport to develop the actual cost of handling any particular traffic. Their purpose as already stated was to compare the cost of handling traffic via the joint rail-barge routes with the cost of handling the same traffic via the all-rail routes. We think the procedures followed in those studies were perfectly proper and valid for that purpose. When the unit costs of handling traffic by rail were de-

veloped, those unit costs were applied to the rail portion of the joint rail-barge movement and were applied in exactly the same manner to the all-rail movement. Any correction or change in the railroad line-haul costs of handling traffic would affect both the all-rail traffic and the rail portion of the joint rail-barge traffic in the same manner. Furthermore because the joint rail-barge traffic receives more terminal service than the average rail traffic, an increase in terminal unit costs would increase the cost of the joint rail-barge movement to a greater extent than it would increase the cost of the all-rail movement. Therefore, all of the detailed criticisms made by the barge lines would not change in any respect the relative cost of the two services.

The barge lines have criticized the railroad cost studies on the ground that the railroad cost units used represent the average costs of transporting all traffic handled by the [fol. 801] Illinois Central and do not represent the average costs of transporting all traffic handled by the Illinois Central and do not represent the cost of transporting the particular composition of traffic to which those units were applied. (F. B. L. Exceptions, p. 898).

The rail-barge traffic under consideration moved on all parts of the Illinois Central System, for example, in many different types of trains and under what might truly be called average conditions on the Illinois Central. Furthermore, although the barge portion of the cost of the rail-barge traffic may vary according to the different commodities handled because of the difference in the physical handling at the port of interchange, this would not be true of the rail portion of such movements. The chief factors to be considered in the development of the railroad line-haul costs are the weight of the load, the weight of the car, and the distance traveled. The type of commodity would not have affected the line-haul or terminal expenses of the railroads. The proper factors were all taken into consideration in the development of the railroad line-haul unit expenses on the basis of gross ton-miles. Under such circumstances, it is perfectly proper to use the system average figures in the development of those costs.

Along the same line, the cost studies have been criticized because the only rail cost units applied by the Cost Section to study traffic were derived from the Illinois Central cost [fols. 802-803] study and were not the costs of the particular railroad on which the traffic was actually handled.

If the Chairman please, this section runs about three or four more minutes.

Commr. Lee: Very well. We will recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:00 p. m., the Commission recessed until 10:00 a. m. the following day.)

[fol. 804] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 26712, 13290, 18406, 19017, 19480, 26679, 26680, 26681, I&S 4032, I&S 4060, I&S 4082

RAIL AND BARGE JOINT RATES AND CONSOLIDATED PROCEEDINGS

Hearing Room "B",
Interstate Commerce Commission Bldg.,
Washington, D. C.,
March 11, 1948.

The above-entitled proceedings came on for oral argument, pursuant to adjournment, at 10 o'clock a. m., before the Commission.

Present: Commissioners Lee (Chairman), presiding, Aitchison, Mahaffie, Miller, Splawn, Rogers, Alldredge, Barnard, and Mitchell.

Appearances:

(The same as heretofore noted.)

[fols. 805-806] PROCEEDINGS

Chairman Lee: Mr. Spencer, you may go ahead.

ORAL ARGUMENT OF HAROLD E. SPENCER (Resumed)

Mr. Spencer: First, I would like to say in answer to Commissioner Miller's question yesterday, that the switching of cars was in the record. It is dealt with at page 528 of our brief, dated August 28, 1939.

When we adjourned yesterday we were talking about the criticism that had been made of the Cost Section's restatement of the cost study, in which the Cost Section used Illinois Central System's unit costs to apply to the trans-

portation over the other railroads that were included in that study. This feature of the cost studies was dealt with by Dr. Edwards at page 76 of his Exhibit No. 1350, where he said:

"A weakness of this restatement is that the rail expenses were based *entirely upon Illinois* Central unit costs, adequate expense data for the great number of rail lines participating in the joint movements not being available. It does not appear, however, that this deficiency would affect the conclusions drawn from this restatement, namely, that the aggregate cost for the joint rail-water movements exceed the aggregate cost if the traffic had been routed all-rail. Any adjustment for higher or lower costs on railroads outside of the Mississippi Valley area would apply in greater or less measure to both the rail-water movement and the all-rail movement."

[fol. 807] Now, I cite that statement of Dr. Edwards for two purposes: First, as an answer to this particular criticism which had been made of the cost studies; and, second, to illustrate the point we made that if there were any changes in the rail expense data, or the rail unit costs, they would apply equally, or almost equally, to both sides of the comparison and would not change the validity of the comparison of relative costs.

Certainly if the fundamental procedures followed were incorrect, that fact would have been pointed out by the Cost Section. The fact that those procedures were adopted by the Cost Section in its restatement clearly indicates that that was a proper method of developing relative costs.

The cost studies have also been criticized upon the ground that they are old. There is nothing to indicate, however, that any changes which have occurred during that period would materially lessen the relative cost disadvantage which the joint rail-barge rates had at that time. On the contrary, we submit that there is more reason to believe that whatever changes there have been would increase rather than decrease the relative cost advantage of the all-rail routes.

We, of course, do not ask you to take that into consideration, but we do feel there is no reason to doubt the validity of the results of the comparison of relative costs simply on the grounds that the cost studies are old.

We regard it as highly significant that the barge lines did [fol. 808] not attempt any comparison of all-rail with joint

rail-barge costs. It is also significant that no matter what method was used in the cost studies that were presented to show the comparison of such costs, the answers arrived at in each case were all very similar and they all showed conclusively that in the matter of relative cost the all-rail routes had the advantage.

Commr. Alldredge: Mr. Spencer, I notice the original briefs here were all written and filed before the passage of the 1940 amendment to the Act, in which the National Declaration of Policy was included. Are there any of the briefs of the carriers or exceptions since that date discussing the policy since that date?

Mr. Spencer: Yes, our Brief on Supplemental Hearing, I believe it is called, Brief on Further Hearing, on behalf of the respondent railroads, in October, 1943, and our exceptions to the Examiner's proposed report and our application or exceptions in reply, all discuss that, and I believe that is the next subject I am going to discuss right now.

Having established that the cost of transporting traffic over the all-rail routes is cheaper than the cost of transporting the same traffic over the joint rail-barge routes, we maintain that there should be no differential in favor of the joint rail-barge routes. We maintain that whatever other factors may or may not be present in a particular situation, the one essential factor which must be present in order to justify a [fol. 809] differential in favor of the rail-barge route is lower cost of service over that route.

Congress did not tell the Commission what it meant by reasonable differentials or upon what grounds such differentials might be found to be justified when it provided in section 307(d) of the Act that such differentials should be prescribed if found to be justified. Those are questions which are left to the administrative discretion of the Commission.

Congress did, however, provide certain basic principles to be considered in determining that question, and those principles are found in the National Transportation Policy.

The one thing upon which all parties here agree is that the question of what constitutes justification for the differentials provided in section 307(d) of the Act that such differentials should be prescribed if found to be justified. Those are all questions which are left to the administrative discretion of the Commission.

Congress did, however, provide certain basic principles to be considered in determining that question, and those principles are found in the National Transportation Policy.

Commr. Aitchison: Mr. Spencer, do you think Congress has given us sufficient standards?

Mr. Spencer: Yes, sir; I believe they have for this case.

Commr. Alldredge: Do we not have this situation confronting us now, in interpreting the National Transporta-
[fol. 810] tion Policy: We have the water lines, which seems to be conceded, with a lower operating cost, all-water, than the rails have all-rail.

Mr. Spencer: We do not concede that point at all.

Commr. Aitchison: You do not concede that?

Mr. Spencer: No, sir; and the evidence in this case does not show that to be a fact.

Commr. Alldredge: Did not the computation of Dr. Edwards show that?

Mr. Spencer: No, sir. In the illustration he showed yesterday in that table on page 18, it showed 11 movements and in all but three of those movements the rail lines had the advantage even between the ports. That is, there were only three long-water hauls where the water lines had the cost advantage just between the ports. That does not take into consideration any of the rail portion of the joint rail-barge movement.

Commr. Alldredge: I am sorry. I got the idea that it was undisputed that the cost by water was cheaper than the cost by rail.

Mr. Spencer: No, sir. That is a very important point, I think. We believe that assumption has been generally held throughout the years. It is not true in this case, and we have shown it is not true.

Congress declared in the National Transportation Policy that it was its policy to provide for fair and impartial regulation of all modes of transportation, so administered as to
[fol. 811] recognize the inherent advantages of each, and to preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

Now, it may seem a little elementary to discuss the National Transportation Policy, but if there is any provision of the Act that has been abused and used with less discrimination than that we do not know what it is. I think it is reasonable to ask what Congress must have had in mind when it provided that the inherent advantages of each mode of transportation must be recognized and preserved. Certainly, the ability to furnish service at a lower cost is an inherent advantage. Likewise, the ability to render a superior and more desirable service is an inherent advantage. Also, the natural location of the carrier with respect to certain traffic might be an inherent advantage.

Those are all inherent advantages which enter the Interstate Commerce Act which the Commission must recognize and preserve. The rail carriers do not propose to take away from the barge lines any of the rights guaranteed to them by the National Transportation Policy. Certainly, for example, if their location with respect to any particular traffic [fol. 812] is such that it can be handled cheaper over the joint rail-barge routes than over the all-rail routes, clearly the Commission must recognize and preserve that advantage.

That provision of the Act does not mean, however, and cannot by the wildest stretch of the imagination be construed to mean that some shipper, 200 miles from some Missouri River port, has a right to have his traffic moved on a differential rate when the expense of handling the traffic over the joint route would exceed the expense of handling it over the all-rail route. The prescription of a differential in such a case would not recognize and preserve the inherent cost advantage of the rail lines but, on the contrary, I would be inclined to think it is an attempt to equalize or eliminate the inherent disadvantage of the rail-barge route.

When I answered your question a few minutes ago, Mr. Alldredge, I did not mean to imply there were no instances in which the barge line might not have the advantage in cost. I merely meant to say that as a general proposition it cannot be taken as established that the water lines have an inherent advantage in the matter of low-cost transportation. Under some circumstances they may have that. I think when Congress passed the Act that Congress believed that water transportation was inherently cheaper in most respects.

Chairman Lee: Is not the fact that there is so much private carriage on the rivers rather indicative?

[fol. 813] Mr. Spencer: They have an advantage in many respects. They concentrate on a few commodities and in many instances the transportation would be inherently cheaper, but it is not inherently cheaper when you consider the general average of all this rail-barge traffic. I think Congress intended to preserve the inherent advantage, where there was one, but I believe there is no warrant for believing that Congress intended that uneconomic services should be perpetuated, or that the rail carriers' inherent advantage of low cost should not be preserved where that is found.

Now, if we take a case where one mode of transportation has a particular inherent advantage, like low cost, and another mode of transportation has another inherent advantage, like a superior service, then the Commission in its administrative discretion must determine how the inherent advantage of each mode is to be preserved in the public interest.

However, in this proceeding, the all-rail routes have the advantage of a lower cost of service. In practically all cases of service they also have the advantage of a superior service. For the Commission not to recognize and preserve the inherent advantages of the rail routes in this proceeding would clearly deny them the right to which they are guaranteed in the Interstate Commerce Act.

If the rail carriers have the lower cost of service and the superior service, and still are not entitled to have those [fol. 814] inherent advantages recognized and preserved, it is hard to imagine any case in which the National Transportation Policy would have any meaning when applied to a rail carrier.

Now, it seemed to us that the barge lines' arguments all come down to the proposition that they think they are entitled to differentials simply because they are barge lines. Their interpretation of the National Transportation Policy is that that declares that they have inherent advantages and, ipso facto, without any further proof, they are entitled to a differential. They do not consider it necessary in any case to show what inherent advantages they might have. We submit there is no support at all for that theory.

The cost-of-service theory, for which we contend, is

consistent with the National Transportation Policy. The theory of the barge lines is not. They pay lip-service to the policy and, of course, say that our inherent advantages are to be recognized and preserved, but they have no explanation of why they contend in this case that the inherent advantage of low cost of service by the all-rail routes is not to be recognized and preserved.

We think that the cost-of-service principle also has promoted and will also promote efficient and economical service and foster sound economic conditions in transportation. However, any principle which would force traffic off the route where it can be handled most economically would [fol. 815] increase the economic burden on the transportation system as a whole.

It was not contemplated by the National Transportation Policy that inefficient and uneconomical service should be of a competitive class and have a competitive advantage to overcome its natural or inherent disadvantages. How would it ever be possible to develop a more efficient and economical service if the Commission should find that it is legally proper and uneconomically sound to say to the carriers who provide such a service, "You cannot have the benefits of the service you provide, but we are going to handicap you so that your competitors who have a less efficient and less economical service will have an equal or better chance to compete for the traffic."

This principle must have been what the Commission had in mind when it said, in Inland Waterways Corporation v. Alabama Great Southern Railroad Company, 151 I.C.C. 126, 144, that from the standpoint of public policy there could be no justification for encouraging an inferior service having a higher cost.

These differentials also cause undue preferences and advantages among shippers. Where this Commission has prescribed the same all-rail rate from two origins to a common destination, the shipper at one of the origins who can use the differential rate has an advantage over his competitor at the other origin who ships all-rail, an advantage which is not due to cost of service or any other transportation condition.

The export-import rate adjustment is another illustration [fol. 816] of how these rates may cause undue preferences and advantages. As a rule, export-import rates have been

established between New Orleans and certain territory on and north of the Ohio River, and on and east of the Mississippi River, so that such rates would be the same as the export-import rates to and from Baltimore, Md. The establishment of these differential rates via the rail-barge routes to and from New Orleans would therefore afford New Orleans an advantage over Baltimore in the solicitation of this traffic.

On these three points, then, we believe the cost-of-service principle is in accord with the principles of the National Transportation Policy and gives force and effect to them. The arguments of our opponents cannot stand up against those tests. If section 307(d) is to be administered and enforced with a view to carrying out the National Transportation Policy, it must be found that no differentials have been justified.

Commr. Alldredge: Can you tell me, without interrupting your argument, where you discuss the relative costs of all-water transportation compared to all-rail transportation in your brief?

Mr. Spencer: One of the points where it is discussed is in our Brief on Further Hearing, dated October 4, 1943, commencing at page 72.

Commr. Alldredge: Thank you.

Mr. Spencer: I think that will give you the information. [fol. 817] The contention of the barge lines that relative cost of service is completely immaterial insofar as the prescription of differentials under section 307(d) of the Act is concerned is completely without legal foundation in the decisions of this Commission. On the contrary, this Commission has held in a long line of cases that relative cost of service is the most important element to be considered when fixing rates between competing carriers.

It is obvious that the cost-of-service area is essential to determine which form of transportation is economically superior or inferior.

There are many cases to show that these differentials have always rested upon cost of service. I would like to refer to two or three of them.

The Commission, in Inland Waterways Corporation v. Alabama Great Southern Railroad Company, 151 I. C. C. 126, 144, said:

couple of situations of that kind where it was admitted there should be no differential because there obviously was no economy. We do not know how many more of those situations there are. There may be several more. We assume it will be generally admitted that there should not be any such differential over such a route. However, in our criticism of Federal's formula in the record at pages 13207 to 13209, we pointed out all these things, and Federal [fol. 844] did not say at that time there should be no differential, and it is obvious the Examiner has given no consideration at all to our evidence of that type or he could not possibly prescribe a differential over that route.

It is probably true that even that situation is consistent with the Federal Barge Lines' theory in this case, for if the traffic is sufficiently highly rated then the barge line, at a lower rate to the shipper, can haul the traffic away from its destination, perform an expensive interchange service, require the rail carrier to perform more service than it would have performed if it had received the traffic at origin, allow the rail carrier revenue equal to what it would supposedly receive under normal all-rail rates equitably divided and still—at least theoretically—make money. And the justification for all this, so they say, is the inherent advantage of transportation by barge.

I do not think there is anything that can be said that illustrates their theory any better than that case.

The question of transit has been injected into this proceeding, and in this connection we merely want to say that the legality of transit arrangements in connection with joint rail-barge routes must be decided in individual cases just as is the legality of transit arrangements in connection with the all-rail routes.

The rail carriers believe they should not be required to [fol. 845] establish transit in connection with differential rates over the more expensive circuitous rail-barge routes. Certainly, if the differentials are to be fixed solely on the basis of what differential will secure the traffic, or upon any other basis not related to transportation conditions, then the circumstances and conditions in connection with that transit are so different from those surrounding transit on the all-rail routes that there would be no legal basis for finding of preference and prejudice under the Interstate Commerce Act.

Furthermore, if the differentials prescribed by the Commission in this case are to measure the disability of the rail-barge service, then the inclusion or exclusion of transit privileges would change the value of the service to the shipper, and it would seem as though where the value of the joint rail-barge service to the shipper is increased by the inclusion of the transit privilege, then the differential ought to be smaller than would obtain if there were no transit privileges in connection with the rail-barge rate.

In some cases service means nothing on a transit shipment, and that should be taken into consideration. It seems to us that it would be completely impossible to attempt to lay down any general rule with regard to transit in this case. After this case is decided I doubt if this situation will be as complex as it is at the present time.

The intervenors have argued that the benfits of this [fol. 846] assumed inherent advantage of low cost for barge transportation should be extended to their regions. The answer to that simply is that if there is any economy in the barge service of course it should be extended, but in most cases there is no economy in the barge service between the ports, and if there is no economy there certainly it cannot be extended.

Furthermore, in a few cases where there is an economy between the ports, just a short rail haul probably overcomes that, and it would make no difference, even if the shipper were only a half mile away from the port if the added service of the interchange, the expense terminal service, overcomes what economy there may be in the port-to-port movement, then there should be no differential for there should be no differential except where *there* is economically justified.

I want to point out again that this is not a case which involves a voluntary adjustment or free competition. This is a case where if the traffic is going to move by these rail-barge routes it must be diverted to those routes by a differential rate.

In closing, the thought which we would like to leave with the Commission is this: When traffic is diverted from the route over which it is carried most economically to a route over which it is carried at a greater cost, the transportation burden of the country as a whole is increased. Someone has to assume that added burden. The question the Commission has to settle is whether any

[fol. 847] justification, legal or economic, exists for increasing that burden. We say there can be no such justification. We think that is what the Commission had in mind in the Inland Waterways Corporation case when it said, "there could be no justification for encouraging an inferior service having a higher cost."

The barge lines arguments all come back to their basic theory that they should have differentials simply because they are barge lines and must have such differentials if the rail-barge routes are to attract any traffic. That was put forth by some of the intervenors also yesterday. All you have to do is to look at the records of American Valley to know that is not true. Are they about to fold up? Of course not. They say that they want more rail-barge rates, but actually we think they are doing everything possible to discourage the handling of such traffic over their routes.

This traffic is being carried at a loss, and the Commission would be doing a favor not only to the railroads but to the Inland Waterways Corporation and the taxpayers, as well, to hold that no differentials have been justified.

We submit that when Congress passed the Denison Act, and similar Acts, it believed that barge lines would have the lower cost of service and that a joint rate structure was necessary to make that economic saving available to the shippers in the territory where that saving could be [fol. 848] economically justified. We have now proved that in large measure that assumption is erroneous.

There is nothing in the Interstate Commerce Act to warrant the view that the barge lines are to be given preferred treatment or that Congress intended any uneconomic services to be perpetuated.

We think the expenditure of huge sums of the taxpayer's money for the benefit of a few favored shippers is a terrible economic waste. That is beside the point here. That is something we will have to put up with until Congress can be persuaded to change that situation.

Now, after all these expenditures, if Congress were able to provide barge transportation at a real economic saving —not counting the public expenditures—that would be one thing; but, actually, after all these expenditures, the rail-barge routes are still inferior services having a higher cost, and that is something which is not totally different. The Commission would not be justified in such a case in transferring the burden of this uneconomic service from the rail-

barge to the all-rail shipper. If Congress wants to do more experimenting with barge transportation at the expense of the taxpayers that as we have said is one thing. The Commission, however, should merely interpret the law as it finds it and should not prescribe differentials until or unless the expenditure of all that money produces a barge service which can operate at a real economic —

[fol. 849] We submit that the rail-barge routes should not have a differential in their favor unless it is justified on the basis of relative fitness and economy.

Commr. Mitchell: Is it not a fact that some of these barge lines are operating at a profit?

Mr. Spencer: Yes, sir; but they are not making profit on joint rail-barge traffic, and that is the only thing this case involves, is the prescription of differentials on that traffic, and that service is not economically justified and should not have a differential in its favor. The best test of such relative fitness and economy is the relative cost of service, and we proved in this case that that advantage lay with the railroads.

We submit that the Commission should find that no basis has here been shown which would support the presumption of differentials in favor of rail-barge routes.

Chairman Lee: Mr. Hillyer, you may proceed.

Oral Argument of C. R. Hillyer

Mr. Hillyer: Gentlemen of the Interstate Commerce Commission, I am appearing here today for the Savannah Sugar Refining Corporation, located at Port Wentworth, Ga., which is within the terminal limits of the City of Savannah, Ga. That company is engaged in refining sugar, raw sugar, brought in from Cuba and Puerto Rico, and in recent years large quantities of it from the Everglades of Florida. The [fol. 850] Savannah Refinery was built, naturally, to serve the territory involved in this case. These differential rates operate up the Mississippi, over on the Ohio, and especially up the Warrior River, right into the heart of our territory.

It is not necessary for me to cite the decisions of this Commission, recognizing the keenly competitive conditions under which sugar is sold. It is a necessity of life, it is in every store, and it moves broadly over the country in great volume. Sometimes a fraction of a cent per 100 pounds will divert tonnage. The importance of sugar traffic in

this case is paramount. It had been said on this record that if it was not for the sugar traffic these barge lines could not exist. The Examiner describes it as an outstanding commodity. He further stated that the largest single item northbound of manufactured commodities was sugar.

One of the exhibits in this case shows that out of a total movement of 1,117,571 tons of manufactured and miscellaneous commodities moving north over the barge line from New Orleans, 428,936 tons was sugar from the New Orleans district.

It is not necessary for me to say that in the New Orleans district are located some of the largest sugar refineries in the country. There are several there that have been there for years. They are the preferred users of the barge lines to our disadvantage. Everything I have here to say today will bear directly on the point that it does not cost less to [fol. 851] haul this sugar up the river than the all-rail rate, and the service the barge line renders is not worth less than the service on the rail lines hauling sugar.

When the Examiner comes to the subject of sugar he recognizes these things I have said. He says, "With respect to the commodity rates on sugar, the existing differentials which were adopted as a compromise pending decision in this case seem to be satisfactory." He leaves them alone.

He wholly misunderstands our position in this case. He says, "Upon this record there is no basis for any differential whatever on this sugar, either on the basis of relative costs of service or the theory of the value of service rendered by the barge line to our big competitors in New Orleans; there is no showing that that service is less than the value of all-rail service."

We have had a good deal of discussion here about the cost of the service, from both sides, the barge lines and the railroads. I do not intend to go into that. I have read most of that testimony and the volumes that you see on your desks there I have counted over 2,000 pages of text just dealing with costs and in the back of many of them there are large numbers of exhibits reproduced.

When this case started in 1935 in New Orleans, I was there, and the barge lines got up and announced in a grand manner that the basis of their case was cost of service, and [fol. 852] they said they were going to prove the case on cost of service, and it ran along that way for some 10 years.

Commissioner Miller will remember that we sat in the

Twin Cities for days and days, with temperatures there of over 100 degrees, listening to nothing but cost of service and analyzing these exhibits. Commissioner Miller went into these exhibits and asked these witnesses many searching questions about them.

With that background, of course, I would like to refer to it just briefly to show the effect on our business. We are not here contending that any natural advantages there, that our competitors have in New Orleans, should be taken away from them. They belong to them and we have no right to claim any advantage of location which they have should be taken away from them for our benefit.

The Examiner states in one place, "The implication from the cost evidence may be regarded as more favorable to the rail carrier than to the barge lines." I state that that language is the height of moderation and understatement. He could have said, "The evidence of the Commission's Cost Section develops that the cost of service by barge-rail routes ranges from 14 to 46 percent greater than the cost by the all-rail routes, and the cost accountants for the Commission took the basis of rates, and the formulas, and the schemes offered by both sides, and gave them fair consideration, fair analysis, and that was their conclusion that the difference was from 14 to 46 percent in favor of the rail [fol. 853] carriers. That has all been presented to you and I will not go into it any further.

I will say I have examined these cost figures myself, and I am inclined to believe, and, in fact, I do believe that the Commission's cost accountants have given a fair, honest, and true recitation of what the cost evidence in this case shows.

As I say, we started out, and it was conceded by everybody that this case would be decided on cost-of-service figures. It was only recently that these other ideas have come into it. It seems when we started out everybody seemed to think that the cost of hauling stuff by water was necessarily cheaper than the cost by rail.

Now, in the Virginia case, 251 I. C. C., I would like to read one statement from Commissioner Mahaffie that presents my point better than I can myself. He states there: "The theory has long been entertained that a shipment is necessarily handled at less cost if a part or all of the movement is by water. But that they may not always, if tested, prove correct. And theory is no adequate substitute for facts

as a basis for the findings we, under the present Act, are required to make."

It is there pointed out that the Commission cannot proceed lawfully upon "assumed" lower costs.

Now, referring especially to the Warrior River, as I told you before, I have been on the river and I have examined that movement down there. We have a great deal of testi- [fol. 854] mony in here about that river. I am especially interested in the differentials on that river because of the geography of the section and our relation to the Southeast.

It is the testimony of the barge line itself, as you have been told here, that that operation never has, and never can be made to pay out its operating costs, and we, the people who are paying for that—and our testimony shows that in three southern States alone, just prior to the time this case was tried, our refinery had absorbed, against that unlawful discrimination against us, over $561,000 on movements of sugar. That is just absorbing the differential that we have.

Now, the physical conditions of the Warrior River have been described here. That route runs through the intercoastal canals from New Orleans over to the northern edge of the Gulf of Mexico. I think it is at Mobile, it goes into the Tombigbee River, and then it runs through the Tombigbee for a while, and goes into the Warrior River, and deliveries are made on the Warrior River.

It is said in the record, "The water distance from New Orleans to Birmingham is 602 miles, and the rail distance is 355 miles." There can be no economies in water hauls of such comparative distances, and the operation over the Warrior River violates that fundamental deduction that these cost accountants have made, and these water carrier experts have made not only here but in other parts of the country. The channels are bad, the locks are small, and [fol. 855] everything militates against an economical operation on the Warrior River, and, as I said before, it is time for that shocking waste to — stopped. We are paying for it. I will not stop to read you what the Examiner says about it, and what the leading witness for the barge line says about it. Our witness frankly stated all these facts on the record, and that is his testimony I have been summarizing here to you today. It is not the testimony of the railroads, but the testimony of my own witnesses, and the testimony of the barge line witnesses.

Now, Dr. Edwards looked into this matter pretty care-

fully, and he dismisses it very briefly. He says, "On the Warrior Division, the through all-rail route has a substantial cost advantage over the joint rail-barge rate." He says it has a substantial advantage. I gave you his average, 14 to 46 percent, and when Dr. Edwards—conservative as he is—says it is substantial, it must be much greater than these average figures I gave you. Of course, the figures are in the record, showing in dollars and cents the losses that have been incurred from year to year.

This Federal Barge Line started in about 1909 and then to 1920, on the theory they would develop the waterway into a favorable agency for the people down there. The law then said it should be turned over as a private enterprise. Here we are 26 years afterwards, and they are not making money [fol. 856] yet, and they need $17,000,000 more to bring this up to date, and they will lose more money than they have been losing.

Commr. Mitchell: They are not asking us for that $17,000,000, are they?

Mr. Hillyer: No, sir.

I am asking you to administer 307(d) of the Act to regulate commerce which prescribes just how you shall decide this case, and it says you shall fix a reasonable differential, and a reasonable differential, as I have argued in my brief at some length, is founded on a reasonable rate, and a reasonable differential can mean but one thing, and that is a rate or differential that pays for the cost of service and leaves some profit over and above.

Now, there is a question of value of service to the shipper. It has been claimed that even though costs must be against them that the value of service is not such that they can afford to charge as much as a rail line. This record shows that that is not true as to the handling of sugar.

We have the testimony of the barge line people on that point, and also the testimony of the president of our company. There is probably no more skilled man to come here and tell you at great length about the situation. The testimony is all abstracted in my brief, filed in 1939. He gives the details of the sale of sugar from Savannah against this barge line sugar, showing how these hundreds of thousands [fol. 857] of dollars in losses have occurred to us, and he brings out clearly the value of the service to the sugar shippers on the barge lines.

Here is the testimony in the record from Witness Huff.

He was at one time manager of the barge lines. We had this introduced as Exhibit No. 1253. He refers to the value of the service to the shippers, and his testimony is that the Sugar transit activities, or arrangements of the barge lines, manifestly have brought to the service considerable tonnage that would not have come to it in the absence of this attraction. That refers to transit provisions which I will come to later.

He says, "Sugar refiners normally have a continuous outturn of considerable value. Market conditions frequently lessen the demand. Still the refinery must continue to keep its plant going. Under such conditions they may load solid barges retaining ownership and letting them go forward by water service utilizing the 15 or 20 days, or more, in transit to make their sales, and if not all sold on arrival at the port of interchange the remainder can be temporarily detained for subsequent sale and reshipment. The place of detention usually being near the point of destination, receivers do not always object to their orders being filled from such stocks, instead of shipped direct all-rail from refinery."

That coincides with the testimony of our witness. The way the sugar is sold, according to this record, if New Orleans sells on a differential rate—this 4 cents a hundred [fol. 858] pounds, this compromise basis the Examiner refers to—we have to absorb the 4 cents out of our price, to meet that competition.

If the barge lines decide to sell on the all-rail rate they can move it by the barge line and sell it at the rail rate and pocket the difference, and one of the leading refiners in New Orleans has said that is exactly what they are going to do, or are doing.

Whichever way they sell this, on the barge-rail rate, or the all-rail rate, we have to take care of it and it comes out of our profits to the extent of very large sums of money.

I can see my time is nearly expired. I want to say a word about this transit privilege: The barge line attempted, when they first operated down there, to put in a transit provision, which was operating very much to our disadvantage, and when we store sugar and transit on the rails, and we store a lot of it, we have to pay the combination rate on the storage part. The Commission has given these New Orleans refiners the storage privilege on the all-rail rate, in competition with us. We say that is advantage

enough. That is unjust to us, but the Commission has decided, and we will accept it, that that should be enough.

I think Mr. Belnap told you that they had abandoned the claim in this case, but the other parties have not said that. The New Orleans refiners represented here by Mr. Schwartz, I understand, are still asking for it.

[fol. 859] There has been a number of cases on that point. A number of us have been through it, and we thought the matter was settled. The Commission condemned this some years ago, in storage and transit, 183 I.C.C. 109. The Examiner, in his report, gives full consideration to this subject. He declines to reverse that decision.

Here is what the Commission said in 183—and nothing has ever been said to deny a single fact that you recited here: "Under the barge line arrangement a refiner at New Orleans or Mobile may ship a solid barge of sugar retaining the ownership therein and utilizing the time in transit to make sale. Upon arrival at the point of interchange any sugar remaining unsold may be placed in storage and sold in the future."

That price is guaranteed. If the price goes down, the purchaser from the refinery gets the benefit of it. If the price goes up, it is guaranteed, so he gets his profit and the benefit out of the storage in transit, no matter which way the price goes.

The Commission found upon consideration of all the evidence: "We are of the opinion that the storage-in-transit arrangement offsets the disadvantages incident to the water movement, and that there is no justification for any differential of the barge-rail rates on sugar which is accorded storage at the interchange ports."

I see my time has just about expired, and I will just say [fol. 860] in conclusion this: We have had some advance rate cases here where the railroads have been trying to get more money. You have been very sympathetic and generous with them. Take the Illinois Central Railroad. They need money perhaps as much as anybody. This record shows at one time they had 4,000 carloads of this fine traffic of sugar moving up the river, and it pays good rates. I did not suppose the Illinois Central ever had any better paying traffic than this sugar traffic. The barge line came along and took this traffic away from them. At the time I am speaking about when this testimony went in they had 400

carloads of sugar left out of 4,000. All of that vast tonnage, we paid the difference on in absorbing the differential. If we are going to help these railroads there is one case where you can help them.

Now, if I told you the truth from this record as to the value and cost on sugar, it leaves the recommendation of the Examiner with no factual or lawful basis whatever. The Supreme Court says that the chief purpose of the Act to regulate commerce is to cut out by the roots every form of discrimination and favoritism and inequality, and upon that authority we ask you upon this record to cut out all these differentials on sugar and give us that equality that I have shown you from the record that we are entitled to under the law.

Thank you.

Chairman Lee: Mr. Disque.

[fol. 861] ORAL ARGUMENT OF WILLIAM A. DISQUE

Mr. Disque: I appear for the Galveston Chamber of Commerce and the Houston Port & Traffic Bureau.

Galveston and Houston are both very much interested in this case. They ship into and out of the Southwest by rail, in competition with New Orleans which ships by rail and barge. The rail-barge rates from New Orleans apply up the Mississippi River as far as Helena, Vicksburg, Memphis, St. Louis, and then inland by rail. These barge-rail rates cover practically all of the Southwest, reaching as far as Denver, Colo., and New Mexico. We are on the railroad side in this case, and we concur in everything Mr. Spencer has said.

We say there is no justification on this record for the differentials that now exist, and no basis for the differentials recommended by the Examiner. We would like to see all of these rail-water rates canceled and put up to the all-rail level.

We are especially concerned with the export and import rates by barge and rail between New Orleans and a wide strip of territory that runs up through the middle of the Southwest from northern Texas and up through Oklahoma, Kansas, and out to Denver. To and from this strip of territory New Orleans has rail rates equal to the rail rates from Galveston and Houston into the same territory, although New Orleans is at a great disadvantage in distance.

Now, taking these rail rates from New Orleans, which are [fol. 862] equal to the rail rates from Galveston and Houston, the barge rates deducted these unjustified differentials and the result is that New Orleans has rates into this strip of territory, this populous and productive territory, lower than Galveston and Houston has, and Galveston and Houston has to meet that competition. In other words, Galveston and Houston have the misfortune of being deprived of their natural advantages of location by reason of these unjustified differentials, by barge and rail.

Most rates in the Southwest, as you know, are on a mileage basis, so these rates are a wide departure from the usual standard. What we object to is taking these unjustified differentials away from depressed rail rates from New Orleans.

Exhibit 1034 shows some examples on import traffic. To Denver, Colo., Galveston and Houston have an advantage of about 258 miles, but this advantage in distance is more than offset by barge-rail from New Orleans, by a 2-cent differential on green coffee and 4 cents on burlap bagging from New Orleans. In other words, the rates, barge and rail, from New Orleans, are in those amounts lower than the rates from Galveston and Houston.

To Hutchinson, Kansas, Galveston and Houston have an advantage of 221 miles, but that is more than offset on bagging by a barge-rail rate from New Orleans 7 cents lower than the rail rate from Galveston and Houston.

[fol. 863] To Wichita, Kansas, we have an advantage of 211 miles, which is more than offset on green coffee and newsprint paper by barge-rail differentials by 5.5 and 5 cents, respectively, in favor of New Orleans.

To Oklahoma City, we have an adva-tage of 206 miles in our favor, which is more than offset on green coffee, canned goods, common sisal and newsprint paper by barge-rail differentials ranging from 4 cents to 7 cents in favor of New Orleans.

To Tulsa, we have an advantage of 159 miles, which is more than offset on canned goods and newsprint paper by differentials of 7 and 5.5 cents, respectively.

To Fort Smith, Ark., we have an advantage of 75 miles, which is more than nullified on newsprint paper by a differential of 5.5 cents.

To Shreveport, we have an advantage of 74 miles, more than nullified on canned goods by a differential of 5.5 cents.

These are just samples and show what Galveston and Houston are up against in competing with New Orleans. These rates from New Orleans by barge and rail permit New Orleans to generate into the best part of our territory. We are in this case to try to have that situation ended.

I might say incidentally that these southwestern rail lines are all effective participants in these rates, so I do not hesitate to say there is really undue prejudice. In addition to that, the barge-rail rates being lower than they should be, [fol. 864] represents destructive competition. They are not justified by the facts in this case. The all-rail costs are lower than the barge-rail costs.

We submit that where distance favors Galveston and Houston, these cities have at least as much right under the law to rates made differentially under the rail rates from New Orleans as the barge lines. We think it is the duty of the Commission to protect us in that matter.

In the Cotton Linters case, 183 I.C.C. 33, involving rail-barge rates from Oklahoma and Arkansas to New Orleans, the Commission gave us some measure of protection. There are perhaps some other cases of the same sort, but in none of these cases did you have before you this evidence that you have here that the costs, all-rail, are lower than the barge-rail costs.

If the all-rail rates between New Orleans and the inland Southwest were to be on a normal level, reflecting distance and geographical location, and if the barge-rail rates were justified on a cost-of-service basis, Galveston and Houston might not be here opposing barge-rail differentials.

There are some peculiarities about these barge-rail rates that I would like to call to your attention, and especially about the routes. As to movements from New Orleans to many important points in the Southwest, the traffic is farther from destination when it gets off the boat at the river landing, Vicksburg, Memphis, or St. Louis, than the distance [fol. 865] from Galveston or Houston to that same destination.

The distance to Dallas, for instance, is 363 miles from Vicksburg and only 242 miles from Houston. To Oklahoma City, the distance is 485 miles from Memphis, as against 464 miles from Houston. To Denver, after the traffic has moved up the Mississippi River all the way to St. Louis—I do not know how far it is, maybe it is 800 or 900 miles—

the distance yet to be traveled to Denver is 890 miles, as against 1057 from Houston. I do not call that an economical route. Yet to most of these points New Orleans get lower rates than Galveston and Houston. If there is to be any differential for rail-barge lines it should be kept fairly close to the Mississippi River and confined to points in Eastern Arkansas and Louisiana and Missouri.

Commr. Aitchison: Would it be practical to restrict these rail-barge rates to such points as we might require the railroad carriers to put joint rates to, if they have not?

Mr. Disque: I do not know that I understand your question.

Commr. Aitchison: They speak about a fair division that the rail carrier would get up to interchange with the barge line. That presupposes there is a joint rate with the rail line. Would we be justified in restricting this case to such cases as we might be able to require the rail carriers to put in joint rates? We could obtain rates not from Houston to New Orleans and then up the Illinois Central to Minneapolis, and then down the river to Denver.

[fol. 866] Mr. Disque: I think you could work out an adjustment.

Commr. Aitchison: Would that apply to your objection, in part?

Mr. Disque: As long as you did not give the barge lines an unjustified differential, I think we could not complain.

There are a few things about the Examiner's report I would like to talk about. We cannot see the logic and fairness of taking the average barge costs and then adding to them certain figures to represent the rail divisions. As the Commission knows, rail divisions represent a good many unknown quantities. They are made up according to the origin and destination of traffic, the length of haul, on considerations of barter exchange and horse trading, and inter-railroad politics, and so forth. There are all sorts of peculiar and anomalous situations that can be used in railroad divisions to make rates. You can make rates out of divisions, but it is a very bad thing.

Mr. Belnap mentioned the Meeding case, but the Meeding case, as I remember it, did not involve divisions, it involved reshipping rates and proportional rates from Chicago.

Divisions do not have the same standing as [illegible] rates. They are relative rather than absolute [illegible] The division

accruing to a carrier generally varies according to the divisions received by the connection. The more one carrier gets the less the other gets. What each carrier gets is dependent on the relative amounts of transportation or service or the [fol. 867] cost thereof.

Accordingly, what a rail carrier allows a connecting carrier cannot fairly be taken as the proper figure to be added to a barge rate or cost for the purpose of building up a joint rate. If the barge line costs do not justify differentials the barge lines will be putting an unlawful burden on their local traffic and will be taking revenue from the railroads.

The Examiner may have had some feeling in his mind that section 307(d) justified differentials, but I think it has been made clear that you must have a basis, you must have justification before you prescribe any differential. Any action without justification, of course, would be arbitrary.

A barge line differential that rests upon inferior service without lost*s* arbitrarily and unlawfully bleeds the railroads to support the barges. We hold no brief for the railroads, but we get the injury that results from the source, or the same source.

The proposed report rests on undulating and shifting sands. That is our view, instead of going down to bedrock for a foundation. We think that if the Commission goes down to bedrock it will come up with our differentials.

We ask you not merely to dispose of these cases but to affirmatively condemn these barge-rail rates into the Southwest wherever they are lower than the all-rail rates.

I thank you.

Chairman Lee: Mr. Wettrick.

[fol. 868] ORAL ARGUMENT OF S. J. WETTRICK

Mr. Wettrick: I assume I was placed at the foot of the list on the theory that as amicus curiae I should be more or less impartial. I have taken that idea into consideration by, for the first time, reducing my argument largely to writing so that I will not overstep the bounds of propriety and avoid a natural tendency to become too contentious.

The general principles involved in this proceeding have been rather fully discussed by other parties, but it seemed to me that sufficient consideration has not been given to the rights of competing shippers and communities, not in a po-

sition to avail themselves of the lower joint rail and water rates.

Commr. Aitchison: Mr. Wettrick, we have lots of friends, we hope, but just how does your friendship for us impel you to come so far to discuss this subject with us today?

Mr. Wettrick: It is because of my general interest in the question involved.

Commr. Aitchison: Does it have any connection with the controversy on the Pacific Coast at the present time?

Mr. Wettrick: It has, but there are other reasons for my appearing and my purpose is to point out certain considerations that I think the Commission should take into consideration, because they will be determinative of similar provisions elsewhere.

It will be my position to show the joint rates lower than the all-rail rates, which are not based on lower transpor- [fol. 869] tation costs, result in discrimination and prejudice against competing shippers and communities, not in a position to use the lower joint rail-and-water rates, and that such rates should not be established for that purpose.

The points I wish to make have general application, and I shall discuss them on the basis of the following proposition:

1. That there is no justification for joint rail-and-water rates lower than the corresponding all-rail rates unless the costs of transportation by the rail-and-water routes are substantially less than by the all-rail routes. That proposition has been rather fully covered, and I do not propose to spend much time on it.

2. That differentials which are not justified by lower transportation costs are economically unsound and result in unlawful discrimination and prejudice against competing shippers and communities.

[fol. 870] 3. That it is not the policy of Congress that differentials shall be established in favor of the rail and water routes, regardless of the relative costs of transportation.

Now in this proceeding, the record shows and the Examiner finds that the costs of transportation actually are less by the all-rail route than by the rail and water route, notwithstanding which, he recommends continuance of differentials in favor of the latter in interpretation of the law and the

administrative duties of the Commission which I believe to be erroneous, and those are the questions that I want to discuss.

The Act now provides that the Commission shall prescribe such reasonable differentials as it may find to be justified. The question therefore is upon what grounds the Commission may find differentials to be justified.

Then a careful analysis of the decisions of the Commission shows that it has always regarded the cost of transportation as the controlling factor in the establishment of differentials. I am telling you nothing new and nothing that has not already been said, but I am leading up to the thing I really want to discuss:

The differentials which the Commission prescribed in the Mississippi Valley cases were all based on the assumption that transportation by water is cheaper than by rail, and were justified on that ground.

[fol. 871] Whenever the Commission was of the opinion that the assumption could not be indulged in, it refused to require the establishment of differentials.

In the case reported in ICC 528, in which the War Department was the complainant, at page 547, the Commission said its conclusion on this question of law is that it has the power to require the establishment of a through route and to prescribe a joint rate which is differentially lower than the corresponding all-rail rate.

"provided the differential fairly reflects the lower cost and value of the barge line's service."

While the idea that the value of the service constitutes a reason for differentials has been frequently referred to, the Commission likewise has recognized that this does not justify a differential in rates unless there is a difference in the cost of transportation.

I am going to quote again for the purpose of emphasis, this statement of the Commission in 151 ICC 126, which I think is logical and unassailable:

"The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. 'From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for

[fol. 872] encouraging an inferior service having a higher cost.' "

Why prescribe rates that will divert the traffic from the rail lines to the joint routes, unless the latter can transport them more cheaply than the all-rail rates can?

In the inland waterway case, 1883 ICC 761, the Commission said this:

"The railroads of the country, considered as, in effect parts of one great system of transportation, are in direct competition for traffic with water lines including the Federal Barge Line. As such competitors, it appears to us that it would be unfair to force them to divert from their rails traffic originated by them to competitive waterlines, except in those instances where it can be shown that the services to be performed can be more economically rendered by the water lines than by the rail lines, or where there is some other justification other than a mere desire upon the part of the waterlines to divert traffic from the rails for the sole purpose of increasing their tonnage and securing the revenue accruing therefrom."

Now, I say those statements cannot be refuted. They clearly indicate that the Commission has always recognized there is no justification for a differential unless there is a substantial difference in the cost of transportation and it would be against the public interest to require the establishment of divisions unless that condition exists.

[fol. 873] The second proposition is this: That differentials which are not justified by lower transportation costs are economically unsound and result in unlawful discrimination and prejudice against competing shippers and communities. As I have already indicated, my primary purpose is to consider the rights of shippers and communities which are not in a position to secure the benefits of lower joint rail and water rates, but which are in competition with those in a position to do so, and we have just had some very important illustrations so far as Galveston and Houston are concerned.

Under such circumstances the establishment of such rates results in the destruction of long-standing and delicate relationships.

Now, the proposed report in this case shows that it was

the desire of shippers for lower transportation charges that were responsible for the creation of the Inland Waterways Corporation and which has operated the Federal Barge Line and for the enactment of the Denison Act, for the purpose of summarily compelling the establishment of lower joint rail and water rates than the all-rail rates on the assumption that the cost of transportation is less by water than by rail.

The report on sheet 13 states that the majority of shippers who presented evidence supported the three barge lines in their contention that differentials are justified. It [fol. 874] also indicates the reason for their position.

Referring to the fact that there was fear that the railroads could not supply the transportation required by an expanding economy, particularly with the abnormal demands in time of war, has been proved unfounded.

The Examiner says that. The report states that—at sheet 21:

"The interest in water transportation among shippers in the Mississippi Valley actually is attributable not so much to a need for additional transportation facilities as it is to the desire for lower charges."

Their attitude is expressed on sheet 4 of the report as follows:

"In any event it seems likely that the shippers in the Mississippi Valley will continue to regard barge lines as having little or no val*ley* to them, except as competing carriers whose effectiveness depends on their maintaining lower rates than those which the railroads are able or willing to make."

Now these findings of the Examiner clearly show that the only interest of the shipper supporting the establishment of rail and water differentials is to secure lower rates, regardless of whether they are justified by the relative costs of the transportation.

As against the attitude of the shippers who are thus [fol. 875] benefit-ed by an artificial rate adjustment, I wish to place the interests of other shippers who are in competition with them but not in a position to secure the benefits of the lower joint rail and water rates.

In the report in 77 ICC 317, reference is made to the fact that the rail lines as a rule equalized export and import rates through the various ports, and that the effect of the proposal was to disrupt this adjustment.

The Commission said that under the proposed plan "insufficient thought seems to have been given to the possible disruption of established rate relationships * * * particularly in the case of export and import rates where ports have been equalized.

The Commission thus recognized that in establishing differentials consideration must be given to discrimination and prejudice resulting from the disruption of established rate relationships.

There are many instances throughout the country where the rates on export and import traffic are equalized to and from competing ports and also where the rates on various commodities are the same to competing markets on domestic traffic, or where there is a definite or well-established rate relationship.

Whenever low joint rail and water rates are established between any of these ports or markets and interior points [fol. 876] which, for reasons of circuity and otherwise cannot be extended to competing ports or markets, it results in a disruption of established relationships to the detriment of those points which those lower rates cannot be extended.

It is my humble opinion there is no justification whatever for giving shippers located at or near a waterway lower rates by rail, and water, than the all-rail rates upon which competing shippers and communities must depend unless the costs of transportation by rail and water are less.

If rates are arbitrarily made lower and costs are justified, the shipper is in a position to use them, and secure an advantage to which they are not entitled, to the detriment of other shippers and at their expense and the expense of the public.

The Commission recognized the statement I just made there in 151 ICC 126, where the Commission said that in the last analysis the public had to pay for wasteful transportation, although it may not be so itemized in the bill, there is general appreciation and recognition of that fact.

Now, this statement applies with equal force to the establishment of any differentials where the cost of transportation by rail and water is not less than by all-rail.

But gentlemen, there is another angle. The railroads must be kept in a condition to render the adequate transportation service necessary. If the users are—if the users [fol. 877] of water transportation are favored, as against the users of rail transportation the latter are required to bear an additional burden to make up for the loss and revenue resulting from the diversion of railroad traffic to the waterlines.

Unless the joint rates are justified by lower operating costs, they constitute in fact a subsidy to the users of the waterlines.

While this is at the cost of rail carriers in the first instance, it must ultimately be borne by the public, including the communities and shippers thereby placed at a disadvantage.

I do not believe that it was the intention of Congress to thus subsidize the users of the joint service at the expense and to the detriment of the users of the rail transportation.

Commr. Mitchell: How do you justify the continued appropriations to Federal, right along, if it was not the intention of the Congress to do that?

Mr. Wettrick: That is due to political considerations. I will show you in a moment what Congress said about it. I want to point out in this connection, that under the circumstances unless the cost of transportation by rail and water is less, then location at or near a river does not constitute any advantage and a differential in rates cannot be justified on the ground that the preferred shippers have a natural advantage of location.

[fol. 878] Now my next proposition is that it is not the policy of Congress that differentials shall be established in favor of the rail and water routes, regardless of the relative costs of transportation, and in that connection I shall try to answer the question that you made, Mr. Commissioner.

On sheet 20 of the proposed report, it is stated that the question involved is one of general government policy and that the public aids to water transportation has generally been regarded as an argument in favor of differential rates, rather than otherwise. The theory here seems to be that since the Government has spent enormous sums at making the rivers navigable, water transportation should now be

provided regardless of the cost thereof, compared with rail transportation and of the effect upon competing communities and shippers.

With regard to this, I would like to say that all sections of the country, including the shippers and communities which would thus be discriminated against and prejudiced, contributed through taxation to the enormous funds which have been expended in the improvement of the rivers for the purpose of making them navigable, and they should not now be penalized for their contributions by the establishment of differentials against them which result in the disrupting of rate relationships which have existed for a long time.

But the proposal here goes even farther than that. If [fol. 879] notwithstanding these large expenditures, the cost of transportation by rail and water cannot now be shown to be less than all-rail, then the establishment of differentials in favor of a former means that the water routes are to be further subsidized at the expense of the competing shippers and communities through the arbitrary establishment of rates, regardless of the relative costs of transportation.

I respectfully submit that the public, having subsidized the water routes through the expenditure of millions of dollars should not now be expected to further subsidize them through the arbitrary establishment of rates lower than the relative costs justify, to the benefit of those in a position to use such rates, and to the detriment of those not in a position to do so.

Now, the Examiner seems to think that the Denison Act indicated a legislative policy that joint rail and water rates should be lower than all-rail rates, regardless of the relative costs of transportation.

The Denison Act was based on the assumption that water transportation is cheaper than rail transportation. If that assumption is not correct, then the premise upon which the Act was based does not exist and the conclusion does not follow.

The committee report quoted on sheet 25 of the proposed report—that is, the committee of Congress—clearly shows that Congress acted on this assumption when it states that [fol. 880] the purpose was to afford the people of a large part of the country "the economies of cheaper transportation by water."

That is what Congress thought it was doing.

If transportation by water is, in fact, not cheaper than joint rates — will not afford people any economies, and it was not the intention of Congress, obviously, that lower rates should be established under such circumstances.

Referring to this, the Examiner said, "It appears that in view of the Committee, the economies of cheaper transportation by water were linked with the Government's outlay for river improvement, and justified the establishment of joint rates between railroads and bargelines lower than all-rail rates, to compensate in some degree for the public expenditures."

The fact is that Congress assumed that the public expenditures had made transportation by water cheaper than by rail, and if so, that the public should get the benefit of it. If notwithstanding these improvements and expenditures, the cost of transportation by rail and water is not cheaper than all-rail, then the result which Congress had in mind does not follow, because no economies are afforded to the people, and we may hope that after the fact is once established, the Congress will take a different attitude with regard to the appropriation of funds for such purposes.

Now, when the committee of Congress said "Joint rates [fol. 881] would afford the people of a large part of the country the economies of cheap transportation by water" and it is evident that it assumed that water transportation was cheaper.

If it is not cheaper, then the shippers which cannot use the rates are compelled through taxation to pay a part of the transportation costs for that group of competitors, and in addition to that, pay higher rates on their traffic in order that the carriers upon which they depend can continue to operate.

However, of course, the most serious result, so far as competing shippers are concerned, is, that in casting that burden upon us, you place the other shippers in a position to take the business away from them. When you divert traffic from the all-rail route, you divert it from the shippers who have to depend on the all-rail routes.

Now the Examiner, in his proposed report refers to the fact that the committee of the Commission—the Commission's legislative committee—suggested the repeal of the Denison Act on the ground that it accomplishes nothing that

cannot be accomplished as effectively under the provisions of the Transportation Act of 1940, then under consideration.

He seems to think that since the Denison Act has now been repealed, there has been no change in the law. However, as we have already pointed out, the Commission said that the barge line differentials are based upon the premise [fol. 882] that the service costs less than the rail service with which it competes and that there could be no justification for encouraging and promoting an inferior servicing of a higher cost, and also it would be unfair to force the railroads to divert from their rails traffic originated by them to competitive water lines, except where it can be shown that they can transport it more cheaply.

The Commission said in Sugar From Louisiana to Arkansas, 167 ICC 710, that: "Except in so far as the Denison Act requires the prescription of joint rates and minimum differentials without hearing, it does not set aside the Interstate Commerce Act. Certainly there is nothing in the Denison Act which deprives competing shippers or communities of the rights extended to them by Section 3 of the Interstate Commerce Act, which prohibits undue prejudice and preference."

I respectfully submit, therefore, that it never was and is not now the policy of the Congress nor of the Commission that certain shippers and communities should receive the benefit of joint rail and water rates lower than the all-rail rates to the detriment of other shippers and communities, unless the economies of cheaper transportation by water justifies same.

Commr. Barnard: Would you have us determine this case entirely on the basis of relative costs of transportation?

[fol. 883] Mr. Wettrick: I think it is the relative factor upon which the case should be decided.

Commr. Aitchison: Is that the position taken by the ports in the Columbia Basin case?

Mr. Wettrick: I did not come here to discuss that case, Mr. Commissioner, but the principle applies.

In general, as I stated, it is the same everywhere. I will have plenty to say about that when the time comes.

Commr. Aitchison: I am talking about the old Columbia Basin River case.

Mr. Wettrick: That is a different proposition than this is. This is a case of arbitrarily establishing lower rail-water

rates than the all-rail rates which I say is not justified unless there is a substantial difference in the cost of transportation.

My interest here is primarily that this connection--the Commission in this connection shall not adopt any such views with regard to this matter as recommended in the proposed report, because it results in uneconomical transportation.

Differentials are justified if there is a difference in the cost of transportation, and any joint rates which are not based on lower costs are economical and sound and unlawful, contrary to the provisions of the Act and result in unjust discrimination, and undue prejudice as against shippers, [fol. 884] localities and ports, and not in a position to avail themselves of the lower rate.

Now, no rates should be established which are wasteful of transportation and economically unsound. A waterway should be used only when it constitutes a real contribution to the national economy and any joint rates which are not based on the cost of transportation are contrary to the legal principle which the Commission has heretofore applied and are not in accord with the public interest.

Now, in view of the effect which the establishment of joint rail and water rates lower than the all-rail rates would have upon shippers and communities not in a position to use them, the Commission in determining the legal principles here involved, I believe, should keep in mind the rates and interests of competing shippers and communities. The problems which affect them are as much a part of the national economy as those of shippers who insist upon the establishment of lower joint rail and water rates merely for the purpose of securing lower transportation costs at the expense of the public generally, including the competing shippers and communities.

I hope that, as a result of this proceeding, the Commission will firmly establish the principle that there is no justification for lower joint rail and water rates than the corresponding all-rail rates, unless there is a substantial differ- [fol. 885] ence in the cost of transportation in favor of the rail and water routes.

Thank you for giving me this opportunity to present these ideas.

Chairman Lee: Mr. Belnap, you have fifteen minutes remaining for rebuttal.

Mr. Belnap: I want to say a word about the difference between status and position of Federal and that of the other water-line respondents.

Federal is a Federal agency. It must operate on the streams where Congress has directed it to operate. It must operate there regardless of whether or not it can cover its operating expenses. It is directed to establish and maintain a scheme and system of through routes and joint rates in connection of all of the water operations which it conducts. It is the policy of the Congress that those joint rates be extended into the interior so that the interior may get the benefit of the cheaper rates. Those are matters of Congressional policy.

It is a Congressional policy that this Inland Waterways Corporation is to do the development and pioneering work on our inland rivers. Because of that situation Federal has continued to operate the Warrior River Division, which has never made its operating expense in any one year since it has been operating.

[fol. 886] It is a condition that could not possibly exist under private management, considering that the Warrior Division is an entity by itself.

Commr. Mitchell: Did Congress ever approve this suggestion and recommendation of Mr. Wallace, who was then Secretary of Commerce at one time, that Federal be sold? Was that ever approved?

Mr. Belnap: The present law provides for the sale of Federal to private management subject, however, to the giving of a bond, that the purchaser will carry on exactly the same service that Federal is carrying on today.

Commr. Aitchison: We are making an appraisal, are we not?

Mr. Belnap: You are making an appraisal for the Department of Commerce at the present time.

I handed you yesterday, Mr. Commissioner, the bill now before Congress seeking to liberalize the terms of sale.

It is hoped and expected by the Secretary of Commerce that he will secure legislation this year which will permit the sale of Federal Barge operations to private management. It is expected that the Warrior River Section will be sold separately.

Commr. Aitchison: Will that obviate the necessity for making the appraisal?

Mr. Belnap: I think it is under this bill, too, you must appraise the bills pending.

Now, because we have done this pioneering and developing [fol. 887] work, we have not only lost money every year on the Warrior, the Missouri River Operations has certainly been unprofitable, and up to the time the hearings closed, the evidence showed that the operations on the upper river north of St. Louis will not yet show development to the point where the revenues would cover operating expenses.

Except under the peculiar unusual abnormal conditions we have experienced just in recent years, I think the Mississippi Division below St. Louis has always made money.

There may have been one or two years when there was some doubt. The annual reports of the corporation are before you by stipulation.

I have looked at the annual report for 1933. In that year and prior years there was a breakdown by divisions. That is Upper Mississippi, Lower Mississippi and Warrior. Those divisions are not found in the annual reports after 1934, but there was a breakdown for the year 1933 and it shows that where the Lower Mississippi made $761,000 profit the upper lost $180,000 and the Warrior lost $77,000.

Yet, it is the policy of Congress that this federal corporation must operate those services and they must operate them in connection with a scheme of through routes and joint rates.

I say to you frankly that it is only because of that policy that when it comes to the Warrior River, we ask that they [fol. 888] be established.

The 1941 report shows that for ten years ending in that year, the waterline operations on the Warrior Division had lost $1,750,000. The revenues had fallen short of just covering operating expenses by that amount.

The later annual reports consolidate the Terminal Railroad operations with the Warrior River Division.

There is a terminal that runs through there that is a profitable piece of railroad. Unfortunately, there is no evidence before you in any of the reports to separate that railroad operation from the waterline operation. The figures I gave you, however, took the waterline operation off by itself and showed you the sad results which have been experienced.

It is the policy of Congress that this business be carried on, and Congress has spent millions and millions of dollars improving these rivers from a navigation purpose standpoint. The railroads put that evidence in this case. They brought their expert engineers who segregated the amounts appropriated for navigation purposes on the amounts appropriated for flood control and such as that. Congress has spent literally millions and millions and the only way the shipping public can obtain any benefit from the operations of the respondent I represent and others who use this river, is to have differential rates.

Commr. Alldredge: Mr. Belnap, I understood you to say in your original argument that the evidence showed that the [fol. 889] cost of all the water service on the Mississippi particularly was then lower than the cost of the equivalent of all-rail service. Did you say that?

Mr. Belnap: I did not, sir. I have made no such comparison and there is no evidence in this record that would permit you to make that comparison.

I said the evidence shows that taking our costs into consideration, and the divisions we should pay out of differential rates to rail carriers, so that they can be treated the same as though connected to a rail line, the aggregate of those two would be covered by the differential rates. That has been our case from the beginning and it is still our case.

Now, I take this from the 1944 report: These differential rates have reflected a saving in transportation charges for shippers for the first twenty years for the corporate existence of $42,765,000.

I might say that as of that period, as of December 31, 1944, our earned surplus was down to $750,000.

Commr. Mitchell: Was that just figured on the merchandise you transported?

Mr. Belnap: The differential rates we maintain and the corresponding all-rail rates. That has been returned to the shipping public during that period, from the Federal Barge Line Operations. It does not include these other respondents It is just the Federal Barge Line Operations. Almost [fol. 890] $43 million was saved for shippers in that 20-year period.

Now, I had hoped in my rebuttal to deal with the adequacy of the all-rail costs. Obviously, the time is much too short for me to even describe that method to you, much less discuss it. The alleged railroad cost study is covered

in some detail at pages 107 to 163 of my 1943 brief, and the same ground is gone over somewhat condensed at pages 100 to 150, of the exceptions to the Examiner's report.

I am not dealing there with whether the railroad costs are significant. I am not dealing with the point of whether they are relevant and whether they are controlling. On those pages of my brief, I attempt to show you that the cost study upon which the railroads rely and which was re-stated by your cost section is completely worthless and unreliable. It is unreliable because it is not really a cost study.

To put it briefly, in 1943, the Illinois Central conducted for one week, seven switching studies from which they secured the cost per engine hour of performing various elements of switching service at seven stations on their line.

They determined for each element of switching service, how many cars were handled per engine hour. From that it is possible to ascertain costs for elements of switching service.

Everything past that point in this cost study is pure assumption. In trying to determine what the cost of origin and destination switching is, the Illinois Central witness [fol. 891] assumed that every car which was receiving an origin and destination service all over the Illinois Central System received the classification system at the average of these seven stations; received one transfer service at the average for these seven stations; received one industrial switching service at the average of these seven stations.

The stations were all river points. They are Cairo and below on the Illinois Central, except for the small point of Dubuque, the cost per car, by that assumption that each car received the average of certain services, ranged from $3 at one of these terminals to something over $9 at another one. They took the seven terminals and assumed the average of the seven which produced a representative figure.

Now there are things right in the cost study that show it is unreliable: For example, in order to use the average per terminal car, and put it on a system basis, they simply multiplied for each primary expense account, the average computed for the seven stations, by the number of cars which the Illinois Central reported to you as originated or terminated by the 1933 action they took, and when they multiply this assumed computed average for primary expense accounts, they in some instances get more money and substantially more money than is reported to this Commission

as their total operating expenses in this particular account for the entire year.

[fol. 892] Yet this study is presumed to be, original and destination terminal switching only.

To give you the extreme example, you have the carriers report separately their yard expenses for certain accounts. One of them is bridges, trestles and culverts.

In 1933 the total system expense, everywhere of the Illinois Central, for that account was $1,707.

Their estimates and assumptions under their cost study resulted in their charging $99,199 to the same expense account as representing original origin and destination terminal switching. It is just an absurd result. That is the extreme, but throughout the cost study, you can find within its four corners, remarkable inconsistencies. You find nothing to support it as being representative. The witness who presented the cost study did not present one item of proof to show that the week taken was a representative week or that the points taken were represen-ative of the terminal points on the Illinois Central. He just assumed when he started to apportion his expenses, things like this, in his seven cost studies:

He assumed that for station expenses, each ton of carload freight should be charged with the same amount as each ton of less than carload freight. It is an absurd situation on the face of it. One carload having fifty tons would be charged with the same cost for station expenses as this study would charge 100 less than carload shipments of 1,000 pounds each.

[fol. 893] As I said, that was a 1933 study.

I want to say one final thing about the application of these cost units. You have to have some traffic to apply them to to make this comparison upon which the railroads rely. They took actual traffic interchanged between barge lines and carriers. One was referred to as the Laurel study, and the other the Vivian Study.

That was actual barge rail traffic but they had to supply rail costs on an assumed all-rail route. They did something quite fancy there. They picked out nice direct straight routes so as to get the costs on the rail side to be as little as possible. We found there was 6.6 per cent variation from the absolute shortest distance you could get by your class rate formula. It was 6.6. The actual routes on the barge

side—that is the rail portion, showed a circuity of 17.5 per cent.

Mr. Vivian selected his so-called logical routes. We showed he took routes that were not even open under the tariff, just to get short routes.

On the application side it is again a matter of assumption and guess, and when you get all through there is not a piece of it worth the paper it is written on.

Thank you.

REBUTTAL ARGUMENT OF MR. HARRY C. AMES

Mr. Ames: Mr. Chairman, I want to pay a deserving [fol. 894] tribute to Mr. Harold Spencer for the manner in which he marshalled his facts and presented his case to this commission.

The railroad record was made by the late Elmer Smith, a man whom I admired and respected as a lawyer, as a friend, and as an opponent.

He unfortunately died. Mr. Spencer had to take a cold record, and you know how long the record took. I think he did a marvelous job.

I want to first divert briefly to the testimony of witness Miller whom I understand spoke on behalf of the Mississippi Valley Association. I do not want to appear critical of that association, duly or unduly, but I just want to say that the differentails which Mr. Child proposed in this case were far too liberal in the use of our money.

When you talk about a differential of $1 in 1934, or 1935 or $1 in 1936, when this record was made, you get out into something really fancy. Our maximum differential at this time was 42 cents. That 58 cent differential would be made up by us. I think Mr. Child advanced a suggestion rather than a proposal that may be helpful and might not be. Even if he had set it up Your Honors, he would have had to immediately knock it down.

Commr. Mahaffie asked Mr. Miller about whether barge lines have joint rates with them, with each other, and I believe the answer was no.

[fol. 895] They do have to quite a considerable extent. They have a number of joint rates which apply through the Texas Intra Coastal Canal, which apply east toward Tampa, even in rates which apply on the Illinois River and the Upper Mississippi where the other lines do not have operating rights.

Commr. Mahaffie: Have you embargo movements under them?

Mr. Ames: No, the only thing we embargoed was the joint rail barge traffic. That had nothing to do with the joint barge traffic.

I want to concur in everything Mr. Belnap says about the cost study. We prepared in 1943, a quite extensive brief, criticizing this study. I concur in what Mr. Belnap said that the study does not represent the true situation.

One of the main points which were made against the study was the use of system average figures by the Illinois Central to spell out costs on fifty-one other lines which have a different volume, a different length of line and a different consist of traffic.

It is utterly absurd to even assume that the expenses of the Illinois Central are the expenses of 51 other railroads.

Now on that average figure we have been quite serious here. I think a little humor might help. On the strength or lack of strength of average figures, I want to quote something that Mr. Earl Zolle of the Illinois Central said when [fol. 896] his line was confronted with it.

I am not reading now from "Forever Amber". I am reading from a brief of the Illinois Central Railroad. This is a little risque. I quote:

> "The danger of any ready acceptance of averages was pointedly put in this illustration recently appearing in one of our nationwide publications: In a group of ten girls, nine were virgins and one was pregnant. On the average, each of the nine virgins was ten per cent pregnant while the girl about to have a baby was 90 per cent virgin."

Now, that is the Illinois Central reaction to average figures when they seem to hit its line.

I am sorry to note that Commissioner Alldredge is not here. He made the point about the comparison of all-water costs with all-rail costs between ports. I made that statement, that all-water costs generally speaking between ports are lower than all-rail and I stand on it.

Now, then Exhibit 1350, which is Dr. Edwards' Exhibit, beginning at page 16, he gives quite a number of illustrations of all-water costs against all-rail costs. In the first place, his all-rail costs are premised on that crazy study. I

call your attention to some of the movements he has given you here.

New Orleans and Baton Rouge. Now, what good does it do to make that comparison? There is no barge line here asking for differential rates involving change at New [fol. 897] Orleans and Baton Rouge.

His exhibit is literally stuck full of those comparisons, where we absolutely disclaim any contention for the establishment of differentials.

You will find in the important movements between New Orleans and St. Louis, between New Orleans and Chicago, where the rail-barge-rail rates are made, that the port-to-port costs are lower.

When it comes to Cincinnati, New Orleans and Cincinnati, which is our little route, he gets us away up the line. He has our costs ranging from 163 per cent down to 103 per cent of the railroad's costs.

Now, that is between ports, mind you, taken at a time when we were a merchandise line, and we were paying good dividends and the railroads were chasing each other into the receiver's courts.

Now, that is his study, measured against practicalities.

Dr. Splawn asked us today whether we would object to consultation by the Commissioners who had to decide this case, with the cost finding bureau, and I purposely asked to reserve my answer until today, because I wanted to give it careful thought.

It is perhaps unfortunate, but it is not any the less true that the cost-findings of this Commission has become an advocate in this case.

[fol. 898] I say that with no odious reflection, but simply because of this: That Bureau or that section has taken two or three conflicting studies and has undertook to re-state them into what it believes to be the proper exposition of costs. Those gentlemen are going to advocate the truth of their re-statement.

You have plenty of evidence in this case on costs. You have plenty of discuss- pro and con, and what those cost figures need is an unbiased and totally separate consideration from the Cost Section of the Commission, and we ask that you give us that consideration.

Commr. Rogers: Do you think there are sufficient facts in the record to enable the Commission to arrive at a reasonable cost estimate of the rail costs?

Mr. Ames: No, because you have that rail lag there that is subject to the infirmities of this rail study.

I think our costs are shown all right. Ours are so simple I think everybody was scared of them.

Commr. Rogers: Do you think we can properly decide this case without reasonably accurate appraisal of the rail cost?

Mr. Ames: That is something that goes right back to my original concept of the case.

Commr. Mitchell: You do not think then the question of whether or not all-rail is cheaper than rail and water, makes any difference in this case?

Mr. Ames: No, I think your true comparison is your rail [fol. 899] rate with your barge line ability to provide a differential.

In order to make my position crystal clear, I would like to state it at this time, by way of sort of an illustrative "If" proposition.

I will start with this premise: If you give credence to Dr. Edwards' cost figures, to the point where you accept them as controlling, and if you agree with the railroad concept of this case and Mr. Wettrick's, that costs, rather than rates are the sole criterion, then we are out.

On the contrary, if you agree with your Examiner, that the barge lines, if they are willing to bear the burden of the rate differential lower than the rail rate, should be permitted to do so and should be given latitude, if you accept his philosophy of the case, we are doubtless in.

Now, in writing my brief in 1943, I tried to visualize the situation, if you, based on these costs, should say that we are not entitled to a differential, I tried to imagine one of you out in the country explaining that action to a shipper who had used a barge service, and I visualized Mr. Angel, vice president of the Stokley Canning Company at Indianapolis who had been a very habitual user of Barge Lines, and I try to imagine some commissioner explaining to Morris Angel why you had cut us on our differentials.

Just on the remote thought that some of you might not read all these briefs, I would like to quote that litte dia- [fol. 900] logue.

I think it is interesting.

"Mr. Commissioner: Have you used rail and barge service in the past at a savings in charges?

"Mr. Angel: Yes.

"Mr. Commissioner: Have you found it satisfactory?

"Mr. Angel: Very much so.

"Mr. Commissioner: Well, we are sorry but as a result of our investigation in No. 26712, we shall be forced to take action which will discontinue this service.

"Mr. Angel: Why?

"Mr. Commissioner: Well, our cost-finding bureau has worked out a cost study and that shows that the railroads can carry this traffic all-rail at a cost lower than that attaching to the joint service.

"Mr. Angel: Well, why is it then that the Mississippi Valley Barge Lines pay dividends regularly while the railroads have gone into receivership?

"Mr. Commissioner: Well, that has nothing to do with the relative costs. You see, these rates are not made on cost.

"Mr. Angel: Well, then, why do you discontinue the service which satisfies us on the basis of a cost comparison?

"Mr. Commissioner: Well, the theory is that the low-cost line is best fitted economically to handle the business [fol. 901] and we must indulge in that theory.

"Mr. Angel: Well, after all I guess we will not be hurt. The railroads can handle the business cheaper than the barges I assume, and they will reduce their charges to barge level.

"Mr. Commissioner: Oh, no. They cannot do that, because under present rates, they are not earning a fair return, and if the rates on this joint traffic were to be reduced their situation would be worse."

Commr. Mahaffie: Did Mr. Angel say whether the Mississippi Valley had made money on this particular traffic which is involved here?

Mr. Ames: At that time it was, yes.

The traffic right now is 'way down and we are losing money on it.

I will leave the case with you, God bless you, and I want to thank Commissioner Miller on behalf of every one in the case for the fair and courteous manner in which he handled this tough proposition in the hearing.

Commr. Miller: It took too long, though.

Mr. Ames: That was not your fault. I believe the parties were largely to blame for this delay.

Commr. Splawn: Are you willing that this case be decided on the record as it is, or do you join Mr. Belnap in the suggestion that if we cannot find for the differential, there [fol. 902] should be further hearings on this?

Mr. Ames: I have gone a long way with Mr. Belnap for thirteen years, but I do not want any more hearings. I think we have had enough.

Commr. Miller: I would like to say that I join you in what you say about Mr. Spencer. We had another unfortunate situation, in that we lost our Examiner, and I would like to say that the new Examiner has done about as well as Mr. Spencer.

Chairman Lee: This closes the argument. The case will be taken under advisement.

The Commission will now adjourn.

(Whereupon, at 1:04 o'clock p. m., the Commission adjourned.)

[fol. 903] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1950

No. 45

APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON—
Filed April 20, 1950

Now come appellants, The Alabama Great Southern Railroad Company, et al., in compliance with Rule 13, paragraph 9, of this Court, and state that they intend to rely upon each of the points set out in the assignment of errors heretofore filed by the said appellants herein.

(S.) Harold E. Spencer, Attorney for appellants.

April 18, 1950.

[fols. 904-905] (Certificate of Service Omitted in Printing.)

[fol. 905a] [File endorsement omitted.]

[fol. 906] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1950

No. 46

No. 47

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY—Filed April 25, 1950

Come now the Appellants in the above-named proceedings and state the points upon which they intend to rely in this Court.

The District Court erred:

[fol. 907] 1. In failing to set aside, annul, suspend and enjoin the order of the Interstate Commerce Commission of June 13, 1949, in its Docket No. 26712, entitled *Rail and Barge Joint Rates.*

2. In finding that the Commission's ultimate findings of fact are supported by findings of evidentiary facts by the Commission which support the ultimate findings.

3. In holding that the findings of the Commission are clearly sufficient to sustain its order and that such findings are supported by substantial evidence, have a rational basis upon which to rest, and are not arbitrary.

4. In holding that the Commission did not misinterpret the provisions of the Interstate Commerce Act in reaching its conclusions in this case.

5. In holding that the Commission's reports and order prescribing the rail-barge rates are within the statutory authority of the Commission.

6. In finding that neither the wording nor the legislative history of section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d), supports the conclusion that differentials are justified only where there is an affirmative showing of lower operating costs for barge-rail than for all-rail transportation.

7. In not finding that the Commission construed the differential provision of section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d), as a mandate for differential barge-rail rates regardless of the showing that costs are at least as great for barge-rail as for all-rail transportation.

[fol. 908] 8. In failing to give effect to the fact that the Mississippi Valley Barge Line Company and American Barge Line Company embargo barge-rail traffic because it is not only unprofitable, but would result in serious loss of revenue and cast an unlawful burden on other traffic of the barge lines.

9. In assuming that any of the three barge lines could participate in barge-rail traffic at a profit.

10. In prescribing barge-rail rates without evidence that the costs via barge-rail were lower than via all-rail and without evidence that the rates were compensatory.

11. In regarding value of service as a basis for differentials without proof that cost of service is less via barge-rail.

12. In failing or refusing to accept the evidence respecting costs as satisfactory indication of present costs.

13. In not accepting the evidence as to average railroad system costs for all traffic as satisfactory indication of actual costs of transporting the articles and commodities involved from and to the points in question.

14. In not finding that the record in the case before the Commission afforded no facts on which differentials could be justified for barge-rail rates between New Orleans, La., and interior points west of the Mississippi River.

15. In not holding that the Commission had arbitrarily and unlawfully prescribed differential rail-barge rates for New Orleans.

[fol. 909] 16. In not holding that as the carriers themselves, under Section 3(1) of the Interstate Commerce Act, 49 U. S. C. § 3(1), could not unduly prefer New Orleans and subject Galveston and Houston, Tex., to undue prejudice and disadvantage, the Commission itself could not lawfully do so.

17. In not holding that the Commission failed to adequately recognize and evaluate the evidence of the Texas interveners and likewise the railroads' general evidence insofar as it affects rail-barge transportation between New Orleans and the interior points west of the Mississippi River; and failed to make proper and necessary findings of fact and state its conclusions on the issues presented.

18. In not holding that the evidence of record would support findings and conclusions that any differential barge-rail rates between New Orleans and the interior western points are and would be unduly preferential of New Orleans and unduly prejudicial to Galveston and Houston interests, in violation of Section 3(1) of the Interstate Commerce Act, 49 U. S. C. § 3(1).

19. In not holding that the evidence of record would support findings and conclusions that rates such as the Commission prescribed for New Orleans would bear an unreasonable relation to the rates between Galveston and Houston, on the one hand, and the interior points, on the other, and be below reasonable minima, in violation of Section 1(5)(a) of the Interstate Commerce Act and the National Transportation Policy declared on the opening page of that Act.

[fol. 910] 20. In not holding that the Commission unlawfully failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for rail-barge rates for New Orleans.

21. In not holding that the Commission's reports and its order lack findings and conclusions essential to their constitutional and statutory validity respecting all rates prescribed and particularly those between New Orleans and interior points west of the Mississippi River.

22. In not holding that Finding 2 of the Commission, as revised in the supplemental report, is arbitrary because the proviso therein undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure, disregarding the barge haul altogether.

23. In not holding that Finding 1 of the Commission is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, although the necessity for a limitation on the entire differential system is recognized in principle by the proviso in Finding 2.

24. In not holding that if the Commission is correct in construing the differential provision of Section 307(d) of

the Interstate Commerce Act, 49 U.S.C. § 907(d), as a mandate for rail-barge differentials for New Orleans regardless of whether factual justification exists, that pro-
[fol. 911] vision is unconstitutional, in violation of Article 1, Section 9, Clause 6 of the Constitution, because that provision prefers Louisiana and other States having ports served by inland waterway carriers over Texas and other States having ports not so served.

25. In holding that the preference of which the Galveston and Houston interveners complain is not given by a regulation of commerce, but by a favorable geographical location.

26. In not holding that by reason of the unconstitutional, arbitrary, capricious, and unlawful action of the Commission in entering its order of June 13, 1949, as to the prescribed barge-rail rates between New Orleans and the interior points west of the Mississippi River, the interveners are left without an adequate remedy at law and will be subjected to irreparable damage if the relief herein prayed for is not granted.

27. In dismissing the intervening complainants' complaint.

28. In the respects indicated in the Assignment of Errors filed in this case by the railroad complainants.

The designation of the parts of the record as made by appellants in No. 748, The Alabama Great Southern Railroad Company et al. v. United States of America et al., [fols. 912-924] covers the parts of the record needed by appellants in the appeals embraced by the statement here filed.

Price Daniel, Attorney General of Texas for Railroad Commission of Texas, Austin, Texas; Wm. A. Disque, Attorney for Galveston Chamber of Commerce and Houston Port and Traffic Bureau, 1001 Fifteenth St., N.W., Washington 5, D. C.

[Acknowledgements of Service omitted in printing.]

[fol. 925] [File endorsement omitted.]

[fols. 926-927] [Certificate of Service omitted in printing.]

[fol. 928] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950

No. 48

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON—
Filed April 26, 1950

Now comes appellant, Savannah Sugar Refining Corporation, in compliance with Rule 13, paragraph 9, of this Court, and states that it intends to rely upon each of the points set out in the assignment of errors heretofore filed by the said appellant herein.

C. R. Hillyer, Attorney for appellant.

April 24, 1950

[fol. 929] [File endorsement omitted.]

[fol. 930] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

Nos. 45-48

STIPULATION AS TO PARTS OF THE RECORD TO BE PRINTED—
Filed July 5, 1950

Plaintiffs' Exhibit No. 1, introduced in evidence of the hearing in this cause before the United States District Court on December 15, 1949, consists in part of certified copies of 16,440 pages of testimony and 1,475 exhibits before the Interstate Commerce Commission in *Rail and Barge Joint Rates*, No. 26712 on the Commission's docket. Such testimony and exhibits have been included as part of the record on appeal herein pursuant to item 25 of the joint praecipe of appellants for transcript of record, heretofore filed herein.

[fol. 931] Inasmuch as the parties to these appeals do not consider it necessary to refer extensively to the testimony and exhibits before the Commission, they have entered into this stipulation for the purpose of minimizing the cost of printing the record herein.

It is, therefore, stipulated and agreed that that part of the record on appeal herein consisting of certified

copies of the testimony and exhibits before the Interstate Commerce Commission in *Rail and Barge Joint Rates*, No. 26712 on the Commission's docket, which testimony and exhibits were introduced in evidence as part of plaintiffs' Exhibit No. 1 at the hearing before the United States District Court on December 15, 1949, and were included in the record on appeal herein pursuant to item 25 of the joint praecipe of appellants for transcript of record, shall stand as part of the record on appeal herein as original exhibits and shall not be printed, but any party and the Court may refer to such documents with the same force and effect as if they had been printed in full in the transcript of record. All other parts of the transcript of record shall be printed, omitting duplication.

Harold E. Spencer, Attorney for The Alabama Great Southern Railroad Company, et al., appellants in No. 45. Wm. A. Disque, Attorney for Galveston Chamber of Commerce and Houston Port and Traffic Bureau, appellants in No. 46. Price Daniel, Attorney General of Texas, Attorney for Railroad Commission of Texas, appellant in No. 47. C. R. Hillyer, Attorney for Savannah Sugar Refining Corporation, appellant in No. 48. Philip B. Perl- [fol. 932] man, Solicitor General, Attorney for the United States of America, appellee in Nos. 45-48. Edward M. Reidy, Attorney for the Interstate Commerce Commission, appellee in Nos. 45-48. Samuel H. Moerman, Harry C. Ames, Nuel D. Belnap, Attorneys for American Barge Line Company, Inland Waterways Corporation, and Mississippi Valley Barge Line Company, appellees in Nos. 45-48. Louis A. Schwartz, Attorney for Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, and New Orleans Traffic and Transportation Bureau, appellees in Nos. 45-48.

[fol. 933] [File endorsement omitted.]

[fol. 934] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

Nos. 45-48

ORDER NOTING PROBABLE JURISDICTION—May 15, 1950

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 54,497, 54,498, 54,499, 54,500. U. S. D. C., Northern Illinois, Term No. 45. The Alabama Great Southern Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, et al., Appellants, vs. The United States of America, Interstate Commerce Commission, American Barge Line Company, et al. Term No. 46. Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants, vs. The United States of America, Interstate Commerce Commission, American Barge Line Company, et al. Term No. 47. Railroad Commission of Texas, Appellant, vs. The United States of America, Interstate Commerce Commission, American Barge Line Company, et al. No. 48. Savannah Sugar Refining Corporation, Appellant, vs. The United States of America, Interstate Commerce Commission, American Barge Line Company, et al. Filed April 14, 1950. Term No. 45 O.T. 1950, 46 O.T. 1950, 47 O.T. 1950, 48 O.T. 1950.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

1950

No. 345

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

HAROLD E. SPENCER,
ROBERT H. BIERMA,
HARRY E. BOE,
CHARLES CLARK,
FRANK H. COLE, JR.,
L. P. DAY,
JAMES A. GILLEN,
ROLAND J. LEHMAN,
Y. D. LOTT, JR.,
JOHN E. McCULLOUGH,
TOLL R. WARE,
Counsel for Appellants.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs, The Alabama Great Southern Railroad Company, et al., submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and order of the United States District Court entered herein on January 12, 1950. A petition for appeal is presented to the District Court herewith, to wit, on March 7, 1950.

Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the final decree and

order of the District Court entered in this case is conferred by Title 28, United States Code, sections 1253, 1336, 2101(b), 2284, and 2321-2325, inclusive, effective September 1, 1948, 62 Stat. 928, 931, 962, 968, 969-970.

Cases Sustaining Jurisdiction

Interstate Commerce Commission v. *Mechling*, 330 U. S. 567;

Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282;

Ann Arbor R. Co. v. *United States*, 281 U. S. 658;

United States v. *New York Central R. R.*, 263 U. S. 603.

Statutes Involved

This appeal involves the interpretation of the following statutory provisions:

Section 307 (d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907 (d)], which reads in part as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to the charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail

rates and the joint rates in connection with such common carrier by water."

The national transportation policy, 54 Stat. 899, preceding section 1 of the Interstate Commerce Act [49 U. S. C. § 1], which reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 3 (c) of the Inland Waterways Corporation Act, as amended by section 2 of the Denison Act, 45 Stat. 979 [49 U. S. C. § 153 (c)], which reads in part as follows:

> "It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as

shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . . "

Other provisions of the Interstate Commerce Act are also incidentally involved.

Nature of the Case and the Ruling of the District Court

This action was brought by plaintiffs who are common carriers by railroad, on behalf of themselves and all other common carriers by railroad similarly situated, to set aside, annul, suspend, and enjoin an order of the Interstate Commerce Commission entered June 13, 1949, in *Rail and Barge Joint Rates,* No. 26712 on the Commission's docket.

Acting pursuant to the authority conferred on it by section 3 (e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980,[1] the Commission, without a hearing, in 1929, granted to the Inland Waterways Corporation operating the Federal Barge Lines (hereinafter referred to as Federal) a certificate of public convenience and necessity and established through routes and joint barge-rail rates between Federal and the rail carriers. It also established differentials between all-rail rates and the barge-rail rates, subject to certain limitations.[2] 153 I. C. C.

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[1] Repealed by section 320(e) of the Interstate Commerce Act, added by section 201 of the Transportation Act of 1940, 54 Stat. 950 [49 U.S.C. § 920(e)].

[2] The Commission devised a formula, commonly referred to as the Ex Parte 96 formula, for determining differentials, which was designed to limit differential joint barge-rail rates to routes which would not be unduly circuitous and over which the barge line's portion of the haul would not be so short that the interchange expense would offset the assumed economies of water transportation. Within these limitations, the joint-barge-rail rates were determined by deducting from the lowest all-rail rate on the traffic involved from origin to destination an indicated percentage (generally 20%) of the lowest corresponding all-rail rate between the ports between which the shipment was transported by barge.

129. Similar action was taken in 1930 in connection with the Mississippi Valley Barge Line Company (hereinafter called Valley) and in 1932 in connection with the American Barge Line Company (hereinafter called American). 167 I. C. C. 41, 182 I. C. C. 521. Federal is a corporation and agency of the United States Government, operating under the Secretary of Commerce. Valley and American are privately owned and operated.

On September 7, 1934, the railroads filed three formal complaints with the Commission attacking the lawfulness of the differentials which the Commission had prescribed without a hearing. At the same time, a petition was filed seeking reopening of certain other proceedings in which differentials had been prescribed. The Commission thereupon, by order dated October 8, 1934, instituted a general investigation, *Rail and Barge Joint Rates*, Docket No. 26712, among other things, into the lawfulness of the existing joint barge-rail rates and differentials. It consolidated for disposition with the general investigation the three formal complaints filed by the railroads and certain other proceedings involving the same general questions.

During the course of the hearings before the Commission, the rail carriers undertook by extensive evidence to show that the cost of transporting freight via the barge-rail routes was not less than the cost of transporting freight via the all-rail routes and that, contrary to the view theretofore widely held, the all-rail routes were in fact far more economical than the barge-rail routes. The barge lines also presented evidence relating to their own costs of operation.

All of the cost evidence, approximately one-fourth of the entire record, was referred for study to the Cost Section of the Commission's Bureau of Transport Economics and Statistics, and at one of the hearings a restatement of rail

and barge cost data with supporting details was introduced in evidence by members of the staff of the Commission's cost section, who reached the general conclusion, quoted by the Commission in its report, that

> ". . . the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic." 270 I. C. C. at 604.

The Commission entered its report on July 7, 1948 [3] 270 I. C. C. 591. Because of changes in conditions which had taken place subsequent to the period 1933-8 covered by the cost studies, the Commission did not make a specific finding of the relative all-rail and barge-rail costs during the period 1933-8. On the whole record, however, the Commission did make the following finding:

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrier, which from the standpoint of cost of service would justify differentials." 270 I. C. C. at 606.

The Commission then discussed congressional policy with respect to water transportation as justification for differentials and, in spite of the finding just referred to, concluded that differentials between all-rail and barge-rail rates were "justified," [4] making the following ultimate finding:

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[3] The Commission also, on June 13, 1949, entered a supplemental report, 274 I.C.C. 229.

[4] The Commission prescribed specific differentials, in cents per 100 pounds, to be deducted from first-class all-rail rates to determine joint first-class barge-rail rates between a great number of key points throughout the United States. These differentials are set forth in appendices to the Commission's report, 270 I.C.C. at 622-641.

"Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified." 270 I. C. C. at 613.

Believing that the Commission had misconstrued the law and its own statutory power, that the reasons assigned by the Commission as justification for imposing differentials on the all-rail routes were not legally sufficient to support its action, and that the Commission's order was not supported by proper findings and evidence, plaintiffs filed their complaint to set aside and enjoin the Commission's order. It was duly heard by a District Court of three judges as provided by law. On January 12, 1950, the Court entered an opinion, findings of fact, conclusions of law, and a final decree dismissing the complaint. The Court held that the Commission had not misconstrued the law as contended by plaintiffs and that the Commission's order was supported by proper findings and evidence. A copy of the Court's opinion, which has not yet been reported, is appended hereto.

The Questions Involved Are Substantial

This is the first time that the Supreme Court has been called upon to construe section 307 (d) of the Interstate Commerce Act with respect to the extent of the Commission's power to establish differentials between all-rail and barge-rail rates.[5]

[5] In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, at 574, 577, the Court referred to section 307(d) of the Act but the power of the Commission to establish joint barge-rail rates and differentials was not there directly involved.

Prior to the institution of this proceeding, the Commission established many differentials on the assumption that barge-rail service was inherently cheaper than all-rail service.[6] The rail carriers proved in this case that such an assumption was false. Yet the Commission, in spite of finding no economies in the barge-rail service to justify differentials, concluded that differentials were justified on considerations of congressional policy, apparently without regard to the substantive provisions of the Interstate Commerce Act. Furthermore, although the Commission made a finding in the language of the statute that the differentials it prescribed "are justified as reasonable differentials" (270 I. C. C. at 619), it made no finding—nor could it have so found from the evidence—that the resulting joint barge-rail rates were just and reasonable rates. Nor did it make any preliminary or subsidiary findings on which such an ultimate finding of reasonableness could be based. Except for allusions to the inferiority of the barge-rail service, it assigned no transportation circumstances or conditions as justification for the differentials. Consequently, it is especially important at this time for the Supreme Court to determine whether the Commission may deprive rail carriers of traffic which they normally carry and give it to their com-

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[6] See, for example, *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528, 546-7, where the Commission said: "The service rendered by the barge line in connection with the through traffic in question is not the same as the service performed by an intermediate rail carrier between the same points, being both slower and cheaper. In view of this difference in cost and value, the portion of the rail-barge-rail joint rate applicable to barge-line service may reasonably be less than the corresponding portion of the all-rail joint rate applicable to intermediate rail service."

See, also, *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126, 144, where the Commission said: "The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

petitors, in complete disregard of the evidence showing that the rail carriers are economically best fitted to handle the traffic and in disregard of the specific limiting standards of the Interstate Commerce Act.

This appeal, therefore, presents several questions of substantial importance to rail carriers, barge carriers, and shippers alike. There is here presented the question whether, in the face of a finding that differentials between all-rail and barge-rail rates cannot be justified by any demonstrable economies in the cost of barge-rail service, the Commission may nevertheless, under section 307(d) of the Interstate Commerce Act, establish such differentials on the theory that they are required by congressional policy with respect to water transportation in the Mississippi Valley. There is also presented the question whether the Commission may establish differentials in favor of barge-rail transportation to offset the lower value of its inferior service and thus give it a rate advantage over the superior service without also finding that the cost of rendering the joint barge-rail service is less than the cost of rendering the corresponding all-rail service. The Court is also called upon to decide whether joint barge-rail rates may be established without a finding that such rates are *per se* just and reasonable.

The order of the Commission will require the establishment of a new system of differential joint barge-rail rates throughout practically all of the United States east of the Rocky Mountains. It is estimated that some 3,000 common carriers by railroad are required by the Commission's order to join in these barge-rail rates and thus to give up to their barge competitors a substantial amount of their traffic.

Important questions relating to the national transportation policy not heretofore passed on by the Supreme Court are also presented by this appeal. Although the Commis-

sion, on the record before it, could find no demonstrable economies in barge-rail transportation which would justify differentials, it said that to recognize the railroads' contention that they have the inherent advantage of lower cost of service "would be tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611. If the Commission is now free to disregard cost of service evidence and to ignore the inherent advantage of the lower cost of service of the rail carriers, as the District Court says it is, then the rail carriers are completely at the mercy of the arbitrary discretion of the Commission. They must give up their traffic to their competitors on whatever basis the Commission may choose to impose on them without any regard to the evidence before it and without any regard to transportation circumstances and conditions. Such, we believe, is not the law.

In this respect, the decision of the District Court is inconsistent with the decision of the Supreme Court in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. We understand the holding in that case to be that the conceded lower cost of the barge carrier there involved was an inherent advantage which the Commission must recognize and preserve. The Court there said:

> "It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition." 330 U. S. at 579.

If it is not within the province of the Commission to protect the traffic of railroads from barge competition, then it certainly is not within the province of the Commission to protect the traffic of the barge carriers from rail

competition when that competition results from the ability of the rail carriers to render a superior service at lower cost. To hold otherwise would be the clearest sort of violation of the policy of Congress "to provide for fair and impartial regulation of all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each; . . ."

The reliance of the District Court on the *Mechling* case and the argument of the defendants that the *Mechling* decision compels the Commission to establish differentials in favor of the barge carriers without regard to cost evidence completely disregards the fundamental factual difference between the cases. In the *Mechling* case, the Commission had found the rates of the barge carrier to be reasonable, and this determination was accepted by the Court.[7] The Court also assumed that the rail rates west of Chicago, which were competitive with the barge carrier involved, were "fair and reasonable for the services performed." 330 U. S. at 582. Thus, the reasonableness of the barge rates, the reasonableness of the rail rates which were competitive with the barge rates, and, consequently, the reasonableness of the difference between them were all accepted by the Court as having been established, and the question was whether the rail carriers east of Chicago could charge higher rates for carrying ex-barge grain than for carrying ex-rail or ex-lake grain between the same points.

In the present case, on the contrary, the intrinsic reasonableness of the joint barge-rail rates and the reasonableness of the differentials between them and the all-rail rates are the very facts at issue, for the determination of which

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[7] See footnote 10, 330 U. S. at 578, where the Court said: "The Commission stated that 'The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding may be accepted as reasonable.' 262 I.C.C. 7, 19."

the Commission instituted its investigation in *Rail and Barge Joint Rates.* The Commission found that there were no economies in the barge-rail service to justify differentials, but it refused to carry that finding into effect. But, under the Act, the Commission must recognize and preserve the inherent advantages of all modes of transportation. How can it discharge this duty without considering relative fitness and economy? If the Commission can ignore relative cost of service, it is difficult to imagine any other evidence that it must consider. Thus, the necessary consequences of the Commission's interpretation of section 307 (d) of the Act reduce that interpretation to an absurdity.

In this case, the Commission also fell into the same error as it did in *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, and *United States* v. *New York Central R. R.,* 263 U. S. 603, and its order here is invalid for the same reason as the orders involved in those cases were held to be invalid. In this respect, there is no substantial difference between this case and the *Ann Arbor* case. Here, as in that case, although the Commission's ultimate findings are worded in the language of the statute, its report clearly shows that the motivation of the Commission was really its interpretation of Congressional policy and not a belief that the evidence before it showed that the differentials were justified or that the joint barge-rail rates were just and reasonable from a transportation standpoint.

This appeal also presents a question of substance with respect to what findings are required to support orders of administrative agencies. The District Court held that "the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seem to us to comprise the 'quasi-jurisdictional' findings which the Supreme Court has declared essential." Such

a holding does not comport with the standards as to necessary basic and essential findings in *Eastern-Central Ass'n* v. *U. S.*, 321 U. S. 194, and *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499. The power conferred on the Commission by section 307(d) of the Interstate Commerce Act is not an arbitrary one to be exercised wholly within the discretion of the Commission so long as it makes the ultimate finding required by the statute. It is a power to be exercised in consonance with all the substantive provisions of the Act and only after preliminary and subsidiary findings show that the evidence before the Commission discloses a rational basis in fact for exercise of the Commission's power.

It is believed, therefore, that the questions presented by this appeal are substantial and that they are of vital public importance.

Respectfully submitted,

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Dated, March 7, 1950.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, el al., Plaintiff

v.

UNITED STATES OF AMERICA, et al., Defendant

Before Lindley, Circuit Judge; Sullivan and Igoe, District Judges

LINDLEY, Circuit Judge:

This is an action to set aside and enjoin the order of the Interstate Commerce Commission entered in a proceeding entitled *Rail and Barge Joint Rates, No. 26712.* The Commission, by order of October 8, 1934, instituted this proceeding as a general investigation into the lawfulness of differentials then existing between all-rail rates and barge-rail rates, established by the Commission in the three years from April, 1929, to March, 1932. In the course of extensive hearings during the ensuing eight years, more than 16,000 pages of testimony and over 1,500 statistical exhibits were received in evidence. Upon conclusion of the hearings, an examiner submitted a report, to which exceptions and replies were filed by all interested parties. Following oral argument before the entire Commission, that body, on July 7, 1948, issued its report and order, which, as modified and corrected by its supplementary report of June 13, 1949, required common carriers by rail and water to establish joint rates over certain through routes specified in the report, these joint rates to be based upon the differentials prescribed in said report. Plaintiffs contend that the order is arbitrary and beyond the Commission's authority, and urge

that it be set aside and its enforcement perpetually enjoined.

A brief history of the controversy which lies at the root of this cause may be of some assistance in its resolution. The Federal Control Act of March 21, 1918, which directed the Railroad Administration to establish water transportation on certain inland waterways, was the first step in the attempted revival of water transportation on the Mississippi River and its tributaries, and the Warrior River. Before any conclusive evidence relative to the propriety of this undertaking was obtained, the war had ended, but Congress, in the Transportation Act of 1920, provided for continuation of the Mississippi-Warrior barge line service, directing that its operations be under the control of the War Department. Four years later, Congress created the Inland Waterways Corporation, of which the Secretary of War was the sole incorporator, and transferred to it the direction of this enterprise. This arrangement persisted until July 1, 1939, when supervision of the Inland Waterways Corporation, operator of the Federal Barge Lines, passed to the Department of Commerce. Meanwhile, privately owned and operated common carriers by water had become active on the Mississippi, and this fact impelled Congress to include in the Transportation Act of 1940 (Part III of the Interstate Commerce Act) a comprehensive plan for regulation, by the Interstate Commerce Commission, of all water carriers engaging in interstate commerce, this legislation having as its declared purpose the preservation of the inherent advantages of each mode of transportation through the impartial regulation of all.

In 1918, the Director General of Railroads, recognizing that shippers would not avail themselves of the slower, more hazardous barge service unless the barge rates were lower than the all-rail rates between the same points, determined that the port-to-port rates should be 80% of the all-rail rates between the same ports, and that the same differential should be applied to shipments moving through the same ports over joint rail-barge routes. This rate system was put into effect over certain through routes

designated by the Director General. After 1920, when the War Department took control of Federal Barge Lines, unsuccessful attempts to persuade the railroads to enlarge the existing joint-rate structure culminated in the filing of a complaint with the Interstate Commerce Commission, in which Federal asked the Commission to prescribe joint rail-barge rates over a number of routes suggested by Federal. The Commission, observing that many of the proposed routes were unduly circuitous and that there was insufficient evidence to enable it to determine which, if any, of the others should be established, suggested that joint rates over some of the routes might better be established through friendly negotiations with the rail lines. Some new joint rates were fixed in that fashion, but the results were, on the whole, so unsatisfactory that Congress, in 1928, passed the Denison Act, which directed the Commission to issue certificates of public convenience and necessity to common carriers by water on the Mississippi, the Warrior, and their tributaries, and, in the event the railroads refused voluntarily to establish through routes and joint rates with such carriers, authorized the Commission to establish such routes and rates and to "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service."

The Commission, acting under the authority conferred on it by this act, granted certificates of public convenience and necessity to Federal Barge Lines, Mississippi Valley Barge Line Company, and American Barge Line Company, and announced the so-called Ex Parte 96 formula for determining whether additional through routes proposed by the barge lines should be established. This formula, which was designed to avoid the establishment of through routes which would be unduly circuitous or over which the barge line's portion of the joint haul would be so short that the interchange expense would offset the assumed economies of water transportation, provided that the joint rates over the routes which were established should incorporate the 20% differential first adopted by the Director General in 1918, except that, for such routes as

barely met the distance requirements of the formula, the differential should be only 10% of the all-rail port-to-port rate. Railroad complaints attacking the reasonableness of the rates and differentials fixed pursuant to the Ex Parte 96 formula led the Commission to undertake the general investigation out of which the present controversy arises.

At the outset of this proceeding the railroads announced their intention of showing that, contrary to popular belief, the cost of transporting freight over barge-rail routes was not less but, on the contrary, actually more than the cost of transporting it all-rail. The barge lines insisted that this was not true. Both sides introduced voluminous evidence relative to their respective costs of service, all of which was referred by the Commission to its cost section for study and interpretation. Although the cost section concluded generally that the cost of joint rail-barge shipping was greater than that incurred in direct all-rail routing and that this was due chiefly to the added terminal handling involved in joint rail-barge traffic, the Commission declined to review this conclusion or to make any finding as to relative all-rail and barge-rail costs in the period covered by the cost studies (1933-1938) because, as it said, "since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail." The Commission did state that "we cannot find that at the present time there are demonstrable economies in barge-rail transportation * * * which from the standpoint of cost of service would justify differentials." However, the Commission felt that the proviso, in Section 307(d) of the Transportation Act of 1940 (49 U. S. C. A. 907(d)), that "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water," did not mean, as the railroads contended, that proof of lower cost of barge-rail service was a necessary condition precedent to the exercise of its authority to prescribe differentials between all-rail and barge-rail rates, and, finding that the differentials set

forth in the appendix to its report, were "justified as reasonable" and "necessary and desirable in the public interest," it ordered the railroads and the barge lines to establish joint rates based on such differentials. These differentials, it might be observed, do not result in the establishment of a wholly new system of joint barge-rail routes and rates; they are, rather, revisions of and additions to the rate structure created under the Ex Parte 96 formula, which was in effect when the Commission's general investigation was initiated.

The position of the plaintiffs, in short, is that, because the Commission could find no demonstrable economies in the barge-rail service which, from the standpoint of cost of service, would justify differentials, there is no legal basis for the Commission's order, based, as they say, solely on its belief that the order is in accord with Congressional intent and policy. They urge that the order, far from carrying out the intent of Congress, violates the national transportation policy, as declared in the Transportation Act of 1940, by depriving the railroads of their inherent advantage of lower cost of service and giving to the water carriers advantages to which they are not entitled on their merits and which Congress did not intend them to have. Finally, the plaintiffs contend that the order is not supported by basic findings of fact, and that this failure to disclose the basis on which the differentials were determined renders it arbitrary and unlawful. The United States, the Commission, and the intervening barge line defendants contend that the order is fully supported by findings based on substantial evidence and that it is in accord with Congressional policy and within the statutory authority of the Commission.

Plaintiffs, asserting that by the Commission's own rule, the basis for barge-rail differentials is that the service costs less and is worth less than rail service, argue that, because the Commission found no economies in barge-rail transportation which from the standpoint of cost of service would justify rate differentials, it was precluded from prescribing such differentials. That the Commission has, on numerous occasions, stated that the lower cost and lower value of

water transportation provide the basis for the existence of rate differentials cannot be doubted. Inland Waterways Corp. *v.* Alabama Great Southern R. Co., 151 I.C.C. 126, 144, Inland Waterways Corp *v.* Aberdeen & R. R. Co., 183 I.C.C. 761, 765, but it has never indicated that proof of lower cost of service is an absolutely essential condition for creation of such differentials. Moreover, it is not at all clear that the lesser cost of the service, which is characterized as "the important factor," from the standpoint of public policy, on which rate differentials are based, means lower *operating costs;* rather does it seem more likely that the phrase means lower *costs to the public.*[8] And finally, plaintiffs' insistence that lower costs are essential to the existence of differentials completely ignores one of the fundamental principles of economics, namely, that the price of a product or a service is determined by its *value* to the consumer. Of course, operating costs incidentally affect the price by establishing a level below which the price cannot be allowed to fall, but, above that level, it is the value to the consumer which finally determines what the price will be.

In the instant case, assuming that the operating costs of the railroads are less than those of the barge lines, it does not follow that joint barge-rail rates should be equal to or greater than all-rail rates, for so to hold would be utterly to disregard the relative values of the respective services and, incidentally, to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service. More important, then, than the relative operating costs of rail and water carriers is the relationship between the rate charged by the rail carrier and the operating costs incurred by the water carriers. So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the

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[8] Footnote: In *I.C.C.* v. *Mechling*, 330 U. S. 567, 580, the Supreme Court said: "* * * Congress knew that barge line rates were cheaper than rail rates, wanted the shippers to get full benefit of them, and left the Commission no power to take that benefit away from shippers by adjusting rail-barge traffic competition or rates."

rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service. Only when the rates charged by the railroads are so low that joint barge-rail freight cannot be transported profitably at a lower rate—i.e., when barge-rail operating costs approach all-rail rates—will there be reason to deny the inferior service the right to exist.[9] In the joint rates established the railroads retain their regular rates; the differential between the all-rail rates and the rail-barge rates is absorbed by the barge lines.

The statutory provision empowering the Commission to prescribe differentials (Section 307(d) of the Transportation Act of 1940) does not make the exercise of this power conditional on an affirmative showing of lower operating costs, but directs that "* * * the Commission shall prescribe such reasonable differentials as it may find to be justified * * *." As the Commission stated in its report, "Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is * * * an affirmative showing (of lower operating costs)."

Plaintiffs' contention that the order is not supported by basic findings of fact but is based solely on the presumed intent of Congress, and that it is, consequently, an arbitrary act without any legal basis must also be rejected. Although the Commission placed great emphasis on what it conceived to be the policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission. It was fully cognizant of the inferiority of the service afforded by the barge lines,[10] a factor which it had previously designated as one basis for barge-line differen-

[9] Footnote: Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor.

[10] Footnote: On page 608 of its report, the Commission stated: "Much evidence was presented by shippers to show that from the standpoint of service barge transportation is inferior to all-rail. The principal disadvantage is the longer time involved. * * * Transfer of shipments from

tials. Inland Waterways Corp. *v.* Alabama Great Southern R. Co., 151 I.C.C. 126, 144. It regarded the shippers' evidence as "of significance because it indicates a fairly unanimous view that the principal object in shipping by barge is to save transportation expense," and, aware that the abolition of differentials would end all barge-rail traffic, concluded that, in the light of the "clear Congressional policy" of aiding and encouraging the development of water transportation on the Mississippi and its tributaries, "joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified."

Turning to the prescription of specific differentials, plaintiffs assert that it is impossible to determine how they were arrived at, but, again, the Commission's report indicates otherwise. Comprehensive proposals for the establishment of differentials were under consideration by the Commission, which, while expressing its belief that "the requirement that the barge line absorb the differential in its division of the joint rate in and of itself provides some measure of safe-guard against the performance of uneconomical barge-and-rail service where the barge line is privately operated, "rejected certain differentials proposed by the Missippi Valley Association because they "would be much too low to permit the barge lines to absorb the differentials without serious revenue effect." Weighing the merits of the various proposals, it found that Federal's proposal was "conservative with respect to the measure of the differentials;" and, pointing to Federal's experimental status, it concluded that "Federal should not be compelled to accept a lower level of joint rates than it considers necessary in the absence of evidence that its proposed rates would be unreasonably high." Although indicating that the Ex Parte 96 formula would not be rigidly adhered to because it had, in the past, produced "some unsatisfactory port relations and other inconsistencies," the Commission declared that

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barge to railroad car or vice versa increases freight damages. • • • In the case of some commodities, barge transportation to some extent is conducive to deterioration or shrinkage on account of the slow transit, or contamination through contact with other freight."

"the circuity and relative-service restrictions in the formula are sound in principle" and rejected certain routes proposed by Valley because they were excessively circuitous.

From the foregoing discussion, it would seem apparent that the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence, and that they are the product of the Commission's expert, informed judgment on the subject. As the Supreme Court said in Ayrshire Collieries Corp. v. United States, 335 U. S. 573, 592, "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. * * * We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance, and competition differently than the Commission has done in this case. That is a task peculiarly for it. * * * The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked."

Plaintiffs, however, insist that the statutory requirements have not been met in this case,—that the order is not supported by basic findings of fact and that, contrary to the provisions of Section 307(d) of the Transportation Act of 1940, it deprives the railroads of their inherent advantage of lower operating costs. Section 14(1) of the Interstate Commerce Act, 49 U.S.C.A. 14 (1), provides: "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made." This statute would seem to provide the conclusive answer to plaintiffs' charge that the order is invalid because not supported by basic findings of fact, for it indicates that, except where damages are awarded,

the report need not contain findings of fact expressly labelled as such. Here, subsequent to its investigation, the Commission made a "report in writing," setting forth its "conclusions" that barge-rail differentials, as prescribed, were reasonable, were justified, and were necessary and desirable in the public interest, together with its "order." Although the formal findings consisted only of findings of ultimate facts, the Commission's report, as has been pointed out, discloses that those ultimate conclusions have ample support in the evidence and in informally stated findings contained therein. The Supreme Court, recognizing that Section 14(1) of the Interstate Commerce Act, relieves the Commission from making "comprehensive" findings of fact, has held that an order of the Commission is valid if supported by what it called "quasi-jurisdictional" findings, Florida v. United States, 228 U. S. 194, United States v. Baltimore & Ohio R. R. Co., 293 U.S. 454; here, the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seem to us to comprise the "quasi-jurisdictional" findings which the Supreme Court has declared essential.

The railroads' contention that the order deprives them of their inherent advantage of lower operating costs rests, of course, on the premise that the cost of shipping all-rail is, in fact, less than the cost of shipping barge-rail. However, in view of the fact that the cost information before the Commission was some ten years old, it seems obvious that the Commission was not required to find, on the basis of that evidence, that all-rail costs are lower than barge-rail costs; and, that the rail-roads' cost data was obtained by the use of average system costs based on the total freight traffic carried by the respective railroads and did not purport to represent the actual costs incurred in transporting barge-rail freight over the routes in question strengthens this conclusion. Baltimore & Ohio R. R. Co. v. United States, 298 U.S. 349, 380-381. The Commission, apparently of the opinion that the cost evidence before it was inadequate to support any affirmative find-

ing as to relative costs,[11] was, however, faced with certain obvious facts,—the sharp decline in joint barge-rail traffic in recent years, the high operating costs and ensuing financial difficulties encountered by Federal which, operating with outmoded equipment, both terminal and floating, was the only one of the major barge lines to haul an appreciable amount of joint barge-rail freight, the virtual embargoes imposed on such freight by the financially sound and better equipped Valley and American lines, all of which led it to state that "In the face of these facts, we cannot find that at the present time there are demonstrable economies in barge-rail transportation • • • which from the standpoint of cost of service would justify differentials." Such a negative conclusion, we think, cannot be said to constitute an affirmative finding that all-rail costs are lower than barge-rail costs; in the absence of such a finding, and in the absence of evidence requiring such a finding, the argument that the order deprives the railroads of the inherent advantage of lower costs must be rejected, for plaintiffs have failed to establish the premise on which the argument is based.

The position of the intervening complainants is that the order violates Sections 1 and 3 of the Interstate Commerce Act in that it gives New Orleans shippers an unjust preference over shippers in Savannah, Houston, and Dallas respectively, by prescribing unreasonably low barge-rail rates, and that it, therefore, violates Article I, Section 9, Clause 6 of the Constitution, which prohibits a preference of the ports of one state over those of another. If the prescribed barge-rail differentials are reasonable and justified as between the barge lines and the railroads, as it seems to us they are, then the contention that the order prescribes unreasonably low barge-rail rates or unduly prefers New Orleans over Savannah and the Texas ports becomes, in effect, a complaint against any rate structure

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[11] Footnote: The Commission's report states that "no useful purpose would be served by reviewing . . . (the cost data) . . . . with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail."

which provides to shippers who are in a position to transport their goods by water, rates which are lower than those available to shippers who are not so located. But it is not the function of the Commission to equalize natural geographic advantages; nor do such advantages constitute undue preferences within the meaning of Section 3 of the Interstate Commerce Act. See Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42, 46, where the Supreme Court speaking through Mr. Justice Holmes, announced the principle, since adhered to by the Commission, that "The law does not attempt to equalize fortune, opportunities, or abilities."

The contention that the Commission's order violates the ports preference clause of the Constitution is, we think, settled by Commission v. Texas & N. O. R. Co., 284 U.S. 125, 131, in which the court said: "The clause of the Constitution invoked is: 'No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.' The specified limitations on the power of Congress were set to prevent preferences as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States." Moreover, in this case, the preference of which the interveners complain is not given by a regulation of commerce but by a favorable geographic location.

The order of the Commission is sustained and the complaint of the plaintiff railroads, together with the complaints of the interveners, are dismissed.

The findings of fact and the conclusions of law herein set forth are made a part of our more formal findings and conclusions of the same date.

Entered this 12th day of January, A.D. 1950.

WALTER C. LINDLEY,
PHILIP L. SULLIVAN,
M. L. IGOE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~. 1950

No. ~~710~~ 45

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLANTS, IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY CERTAIN APPELLEES.

HAROLD E. SPENCER,
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QUESTIONS PRESENTED.

This appeal presents the following substantial questions:

1. Whether § 307(d) of the Interstate Commerce Act is a congressional mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

2. Whether, under the national transportation policy, the Commission may refuse to recognize appellants' inherent advantage of lower cost of service and prescribe differentials in favor of barge-rail service in spite of its finding that there are no demonstrable economies in such service to justify the differentials.

3. Whether the Commission may deprive appellants of their inherent advantage of superiority of service by establishing differentials based on the inferiority of the barge-rail service.

4. Whether the Commission may establish joint barge-rail rates without a finding that such rates are just and reasonable.

5. Whether the Commission's order is supported by proper findings.

6. Whether the Commission's order is supported by substantial evidence.

PRELIMINARY STATEMENT.

That the questions presented by this appeal are substantial was not challenged by the Department of Justice, no motion to affirm having been filed on behalf of the United States. The motion filed by the Commission carefully avoids any statement that the questions involved are not substantial. The motion of the barge lines alleges that no substantial questions are presented by the appeal, but such an assertion is belied by the very length of the motion. The motions of the Commission and the barge lines are in reality briefs on the merits of the appeal and hardly seem to be within the spirit of Rule 7, paragraph 4, of this Court.

Neither motion to affirm denies the allegation in appellants' statement as to jurisdiction that this is the first time this Court has been called upon to construe § 307(d) of the Interstate Commerce Act with respect to the extent of the Commission's power to establish differentials between all-rail and barge-rail rates.

On September 18, 1940, during the pendency of this proceeding before the Commission, the Transportation Act of 1940, 54 Stat. 898, became effective. Among other things, Congress adopted a formal declaration of the national transportation policy and added to the Interstate Commerce Act, as Part III, a comprehensive plan for the regulation of water carriers in interstate commerce. Section 307(d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907(d)], added by the Transportation Act of 1940, is the statutory provision on which the Commission's power to prescribe differentials between all-rail and barge-rail rates is based. This is the first case to reach this Court since the enactment of § 307(d) of the

Interstate Commerce Act which directly involves the power of the Commission to establish joint barge-rail rates and differentials between them and the all-rail rates under that section of the act.

Appellants' complaint charged that the Commission's order rested upon and was vitiated by its misinterpretation and misconstruction of § 307(d) of the act and other statutory provisions. Appellants also charged that the Commission's order deprived them of inherent advantages which, under the national transportation policy, they were entitled to have recognized and preserved.

Appellants believe that the District Court did not fairly attempt to meet the issues raised. Nor do the motions to affirm make any real attempt to answer these contentions. For the most part, these motions are an exposition of the usual thesis of administrative finality: that this is a matter which is left to the discretion of the Interstate Commerce Commission and that, in a record of some 16,000 pages of testimony, there must be some evidence to support the order of the Commission. This Court, however, has always been willing to look behind the smoke-screen of expertise to determine whether an administrative agency erred in applying the law under which it was acting.

The Commission's order establishes new barge-rail rates throughout practically all of the United States east of the Rocky Mountains and vitally affects a large number of carriers and shippers throughout the entire United States. Appellants respectfully submit that the questions raised by this appeal are substantial and should be passed on by this Court only after the fullest consideration.

ARGUMENT.

I.

Whether § 307(d) of the Interstate Commerce Act Is a Congressional Mandate for the Prescription of Differentials Between All-Rail and Barge-Rail Rates Regardless of Relative Cost of Service or Other Transportation Circumstances and Conditions Is a Question of Substance.

A mere reading of the Commission's report, especially the section entitled "THE JUSTIFICATION FOR DIFFERENTIALS —*Congressional policy,*" (270 I. C. C. at 609-613) will make it readily apparent that the Commission construed § 307(d) of the act as a congressional mandate for the prescription of differentials in favor of barge-rail transportation. Furthermore, it is clear that in reaching such a conclusion the Commission was greatly influenced by § 3(c) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 979, and that the Commission completely ignored the provisions of the national transportation policy, 54 Stat. 899.

Appellants contend that there is nothing in § 3(c) of the Inland Waterways Corporation Act which requires the Commission to establish differentials in favor of barge-rail transportation to which it is not entitled on its merits. Furthermore, the Commission in interpreting § 307(d) of the Interstate Commerce Act is required to take into consideration the provisions of the national transportation policy. Appellants contend that lower cost of service and superiority of service are inherent advantages of the rail carriers which, under the doctrine of *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, the Commission is required to recognize and preserve.

Section 307(d) of the act confers on the Commission the power to establish joint barge-rail rates "whenever deemed by it to be necessary or desirable in the public interest, after full hearing . . ." It also provides:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

This obviously is not an arbitrary direction to prescribe differentials. Congress clearly intended the Commission to exercise discretion in determining when differentials are justified and when they are not, and it intended this discretion to be exercised in accordance with the evidence before the Commission. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it." *Chicago Junction Case,* 264 U. S. 258, 265.

In that part of their motion in which they discuss the legislative history of the Transportation Act of 1940, the barge-line appellees refer to the fact that the Commission considered it its "'duty' to provide differentials unless they were clearly not justified because the proposed routes would be 'unduly circuitous or otherwise uneconomical.'" This confirms appellants' charge that the Commission regarded § 307(d) as a mandate to prescribe differentials. But the act does not read that "the Commission shall prescribe differentials unless shown to be unjustified." It very plainly says that "the Commission shall prescribe such reasonable differentials as it may find to be justified." Before the Commission may prescribe differentials, it must, therefore, have before it evidence from which it can rationally and logically find that differentials are justified. For

the Commission to find that differentials are not justified by demonstrable economies in the barge-rail service and then to prescribe them, without pointing to any evidence which does justify them, is arbitrary action.

The Commission was obviously considerably influenced by § 3(c) of the Inland Waterways Corporation Act which, according to the Commission, declared it to be "the policy of Congress to continue the transportation services of the corporation until among other conditions 'there shall have been published and filed . . . such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers.'" 270 I. C. C. at 610. The Commission then concluded:

> "In the light of legislative history the term 'privileges of joint rail and water transportation' must be understood as referring to barge-and-rail rates lower than all-rail rates." 270 I. C. C. at 610.

Appellants submit that there is nothing in § 3(c) of the Inland Waterways Corporation Act which can possibly be construed as an arbitrary direction to establish differentials in favor of barge-rail transportation. That act specifically provides that such rates shall be reasonably fair to both rail and water carriers. It discloses no intent on the part of Congress to give the water carriers an arbitrary advantage over the rail carriers.

In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, this Court had under consideration § 500 of the Transportation Act of 1920, 41 Stat. 499, which declared it to be "the policy of Congress to promote, encourage, and develop water transportation, . . . and to foster and preserve in full vigor both rail and water transportation." This Court held that this admonition did not mean that the rail carriers were required to maintain

a rate to protect the profits of the water carriers. The Court said that the most this could mean was that there should be "impartial recognition and promotion of the interests of all." 292 U. S. at 288. This same ruling is equally applicable to § 3(c) of the Inland Waterways Corporation Act.

In any event, this question is definitely settled by the national transportation policy, the latest expression of the policy of Congress, wherein it is said:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; . . . ." 54 Stat. 899.

The Commission, however, not only ignored its duty of recognizing and preserving the inherent advantages of all modes of transportation, but specifically rejected appellants' arguments based on the national transportation policy. 270 I. C. C. at 611. It is obvious that the reason it did so was because it believed that to recognize appellants' inherent advantages would be "tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611. No other conclusion is possible. This important and substantial error of law completely nullifies the Commission's order.

Furthermore, in resting its decision on supposed congressional policy rather than upon the substantive provisions of the Interstate Commerce Act, the Commission committed the same error as it did in making the order which was held invalid by this Court in *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. There is no substantial difference between that case and this. This was one of appellants' principal

contentions in the District Court but the Court did not discuss this case, and neither motion to affirm attempts to distinguish it although appellants' statement as to jurisdiction again calls attention to the fact that the order here under consideration has the same defects as the order involved in the *Ann Arbor* case.

With reference to this contention, the District Court said:

> "Although the Commission placed great emphasis on what it conceived to be the policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission."

Appellants submit that this statement is not in accord with the facts, as a reading of the report will show. It seems plain that the Commission was not prepared to make its order on independent grounds apart from the supposed congressional policy. Cf. *United States* v. *New York Central R. R.*, 263 U. S. 603, 611.

The District Court suggested that the Commission was aware of the inferiority of the barge-rail service. In addition, however, to the fact that the Commission did not give any indication that it considered the differentials justified on such a basis is the fact that, under the national transportation policy, the lower value of the service cannot be regarded as justification for the differentials. This contention of appellants, discussed under point III of this brief, was ignored by the District Court.

It is, therefore, abundantly clear that whether the Commission has properly construed § 307(d) of the act as a congressional mandate for the prescription of differentials between all-rail and barge-rail rates is a question of substance.

II.

Whether, Under the National Transportation Policy, the Commission May Refuse to Recognize Appellants' Inherent Advantage of Lower Cost of Service and Prescribe Differentials in Favor of Barge-Rail Service in Spite of Its Finding That There Are No Demonstrable Economies in Such Service to Justify the Differentials Is a Question of Substance.

Appellants undertook to show before the Commission that the cost of transporting freight via all-rail routes was less than the cost of transporting freight via the corresponding barge-rail routes and that there was no economy in the barge-rail routes which would justify differentials in their favor. Certainly the testimony of one of the Commission's cost experts that "the cost for the joint rail-barge routing is greater than that for the direct all-rail routing" (270 I. C. C. at 604) adds great weight to appellants' contention that they have the advantage of lower cost of service. Appellants contended before the Commission that this lower cost of service was an inherent advantage which, under the national transportation policy and the doctrine of *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, *supra,* the Commission was required to recognize and preserve.

Appellants have never contended or inferred that the Commission made an affirmative finding that all-rail costs are less than barge-rail costs and the validity of appellants' contentions does not rest upon the premise that the Commission did make such a finding.

The validity of appellants' contentions rests upon two simple facts: first, the Commission's finding that

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in

> barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials." 270 I. C. C. at 606

and, second, the finding that the Commission could not accept appellants' argument, based on the national transportation policy, that

> ". . . the rail respondents contend that they should now be found to have an inherent advantage even though the necessary consequence of such a finding would be tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611.

In this case, the Commission prescribed a system of differentials to prevent the all-rail routes from competing with the barge-rail routes except under a competitive handicap. Its only possible justification for doing so would be to preserve some inherent advantage of the barge lines. But what possible inherent advantage do the barge lines have in this situation? Clearly, they have none. Under such circumstances, it is obviously without legal significance whether the Commission makes an affirmative finding that the all-rail routes have the cost advantage or makes what appellees call a negative finding that the barge-rail routes do not have such an advantage. In either case, for the Commission to give the barge-rail routes a rate advantage over the all-rail routes is arbitrary and without a rational basis. As previously pointed out, the act does not say that the Commission shall prescribe differentials unless shown to be unjustified. It says that "the Commission shall prescribe such reasonable differentials as it may find to be justified."

Furthermore, the refusal of the Commission to recognize appellants' inherent advantage on the ground that it would be tantamount to abrogation of the express policy of

Congress with respect to water transportation, is clearly such a misconstruction and misinterpretation of the law and of the statutory power of the Commission that it completely vitiates the order of the Commission.

The national transportation policy provides that all of the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the declaration of policy. It is just as much a part of § 307(d) of the act as if specifically written therein. That policy cannot be carried out unless the Commission appraises the inherent advantages of the competing modes of transportation and gives effect to their relative costs of service.

In this connection, it is important that the Court bear in mind that this case is not one where the Commission was passing on the reasonableness of a voluntarily established rate. This case involves the power of the Commission to fix a differential between two modes of transportation competing for the same traffic. Cost of service is of far greater significance in the latter case than in the former. When this is borne in mind, it is readily seen that the cases cited by appellees on the significance of cost of service are of little value here. Before the Commission may impose a differential on the all-rail routes it is essential that it find that the differential is justified by some economy in the barge-rail service.

This basic distinction may be shown by reports of the Commission. In *Inland Waterways Corporation* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, 133, the Commission said:

> "It is evident that complainant is under some misapprehension with respect to our duty and authority in establishing new through routes. To permit carriers to maintain for competitive reasons circuitous routes and rates thereover is one thing; but to require them to do so is quite another thing. . . . But here we are

asked, not to refrain from interfering in what connecting carriers wish voluntarily to do for competitive reasons, but to compel an unwilling rail carrier to join in new barge-rail routes which will compete with existing all-rail routes which are amply capable of handling the business. Plainly if we are to accede to such a request, it should appear that the new routes will be reasonably economical."

In the same case, at page 144, the Commission said:

"The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

In *Petroleum and Petroleum Products, Calif. to Ariz.*, 241 I. C. C. 21, 42, the Commission stated:

"The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petroleum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity carried are of less importance."

These expressions of the Commission show that the late Commissioner Eastman was but stating an obvious truth in his concurring opinion in *Naval Stores From Mississippi to Gulf Ports*, 235 I. C. C. 723, 738, when he said:

"Cost-of-service evidence is essential to determine which form of transportation is economically superior or inferior."

That lower cost of service is an inherent advantage which must be protected seems too clear for argument. Surely, that is what the *Mechling* case means, as pointed out in appellants' statement as to jurisdiction. Appellees' brief reference to the *Mechling* case confirms what appellants had pointed out: that the facts there were different from those in this case but that the principle of that case is applicable here. It is also to be noted that the Court there said:

> "Although barge lines were much slower than railroads, they were less expensive to operate and therefore could afford to transport freight much more cheaply than railroads." 330 U. S. at 570.

For the Commission to establish differentials in favor of the barge-rail service in the face of its finding that there are no demonstrable economies in that service to justify differentials is the clearest sort of violation of the national transportation policy and the principle of the *Mechling* case.

It is clear that the Commission's refusal to recognize appellants' inherent advantage of lower cost of service was not due, as appellees and the District Court suggested, to any belief on the part of the Commission that the cost evidence was stale, but was due, by the Commission's own admission, to its belief that the recognition of such inherent advantage would be tantamount to the abrogation of the express policy of Congress with respect to water transportation. It should be remembered that the Commission was here dealing with relative cost of service and that, as testified by the Commission's cost expert, important factors contributing to the higher barge-rail cost "are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic." 270 I. C. C. at 604. To the extent that the costs

have changed, there is not the slightest reason to believe that the relative positions have changed in favor of the barge lines.

In any event, it was incumbent on the Commission to carry out the national transportation policy and to recognize the inherent advantages of all modes of transportation. Since this was a general investigation instituted on the Commission's own motion, if the Commission considered the evidence as stale or deficient in any respect, then the Commission lacked a proper and rational basis for the entry of its order, and the proper procedure would have been for the Commission to assign the proceeding for further hearing to correct any deficiencies in the record which it believed to exist. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248.

The suggestion of the District Court and appellees that the cost studies of appellants were deficient because based on "average costs" has no place in this proceeding. This same contention was made before the Commission and was not passed on by it because it declined to make a detailed finding as to relative costs. Since the Commission did not pass on this criticism, the District Court should not have done so. The answer to the criticism is, however, that the barge-rail traffic involved moved over all parts of appellants' systems and was handled under all types of transportation conditions. Such use as was made of system averages in developing rail costs was entirely proper and reliable under the circumstances. The system average unit costs referred to are the gross ton mile unit costs for transporting the traffic in line-haul service. It is recognized by all familiar with cost procedures that this unit cost evaluates the influence of transportation conditions as they relate to the varying weights of the loads with varying percentages of empty return and varying length

of haul. This is the unit by which the performance of a given amount of transportation service is most variable, and is the result of dividing the line-haul expenses by the homogeneous assembly of service units—the gross ton mile. The use of this system average unit price, when applied to the number of service units applicable to the rail movement of the joint barge-rail traffic, results in the most accurate determination of costs for the performance of that service that it is possible to secure. Furthermore, the same costs were used in developing both all-rail and barge-rail costs.

It is clear, therefore, that appellants' contention that the Commission must recognize appellants' inherent advantage of lower cost of service raises a question of substance.

III.

Whether the Commission May Deprive Appellants of Their Inherent Advantage of Superiority of Service by Establishing Differentials Based on the Inferiority of the Barge-Rail Service Is a Question of Substance.

The District Court said that the Commission was fully cognizant of the inferiority of the barge-rail service and, in effect, held that differentials might properly be justified by the inferiority of the service. That differentials cannot be justified by the inferiority of the barge-rail service is amply demonstrated by the words of the national transportation policy itself.

Just as lower cost of service is an inherent advantage so likewise is superiority of service an inherent advantage which, under the national transportation policy, the Commission is required to recognize and preserve. To place a competitive handicap in the form of a rate differential on

a superior service is a clear violation of the national transportation policy.

Although the Commission referred to the inferiority of the barge-rail service, it did not indicate that this inferiority furnished any legal basis for differentials. The Commission well knows it does not. In *Rubber Products Between Southern and Ohio Points*, 41 M. C. C. 93, 98, the Commission said:

> "Essentially, the protestants seek an equalization of competition by the imposition of a rate differential on a competing more efficient mode of transportation. Such a request must be denied as inconsistent with the national transportation policy."

Why did the Commission not apply that principle here? Simply because it felt that congressional policy with respect to water transportation compelled it to ignore the requirements of the national transportation policy.

A substantial part of appellants' brief in the District Court was devoted to a showing that the legislative history of the Transportation Act of 1940 clearly indicates that Congress did not intend the water carriers to have any arbitrary advantages over other modes of transportation to which they were not entitled by the economy of their service. Congress inserted in that act many provisions to safeguard every legitimate advantage of the water carriers. It is apparent, however, that Congress intended to protect only those advantages of the water carriers which were inherent in their lower operating costs. The very excerpts from the legislative history of the 1940 act cited in the barge-line appellees' motion confirm this and show how untenable the position of the barge lines is. In the statement of Representative Halleck, cited in their motion, appears the following:

> "As a result the ceiling of rates is fixed by the

railroads. The water carriers operate under that ceiling at a competitive point because their costs are less. This bill recognizes that differential and the reason supporting it.'' 84 Cong. Rec. 9711.

Representative Halleck also referred to language in the bill providing that the Commission should consider

> ". . . the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service."*

The congressional debates show beyond question that Congress meant exactly what it said when it told the Commission to recognize and preserve the inherent advantages of all modes of transportation. This legislative history was ignored by the District Court. Appellants believe that it presents a substantial question which should be fully explored by this Court.

Appellants do not take the position, as suggested by appellees, that the inferiority of the barge-rail service as compared with all-rail service is not legally relevant to the issues in this proceeding. Appellants do not deny that value of service is a factor entering into the reasonableness of a rate, and they do not deny that a carrier may voluntarily establish a rate taking into consideration the value of its service. But in this proceeding where the Commission is fixing a differential between competing modes of transportation, it can give recognition to the lower value of the service only to the extent justified by lower cost.

Under the national transportation policy, the Commission may not prevent a superior service from meeting the competition of an inferior service by establishing a rate

* Compare the language in § 307(f) of the Interstate Commerce Act, 54 Stat. 938, [49 U. S. C. § 907(f)], cited in footnote 4 of the Commission's motion to affirm.

differential based on that inferiority. Therefore, while the inferiority of the barge-rail service is a factor which the Commission may take into consideration in fixing the measure of a differential justified by the economy of the service, the mere inferiority of the service cannot legally be regarded as justification for the differential. To hold otherwise would deprive appellants of one of their inherent advantages.

IV.

Whether the Commission May Establish Joint Barge-Rail Rates Without a Finding That Such Rates Are Just and Reasonable Is a Question of Substance.

The Commission did not find that the joint barge-rail rates which it prescribed were just and reasonable rates. Appellants contend that such a finding is indispensable to the validity of the Commission's order.*

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* The barge-line appellees charge that this contention rests on no allegation in the complaint. It appears, however, that this contention is well within the allegations of paragraph XI of the complaint that "The Commission's order . . . is . . . without support in necessary findings of fact . . ." and within the allegations of paragraph XVIII that "The Commission . . . acted arbitrarily, capriciously, unlawfully, . . . and without support in necessary preliminary findings in making its ultimate findings . . ."

The barge lines' statement that this was not discussed in the District Court is likewise erroneous. On argument before the District Court, counsel for appellants stated as follows:

> "We have taken the position that the Commission cannot prescribe any rates which are less than maximum reasonable rates. The Commission says it can. I think the point is unimportant here for the reason at least the Commission admits the resulting rates have to be just and reasonable rates. But there is no finding, not even an ultimate finding in the Commission's report that the resulting barge-rail rates are just and reasonable rates, and that was one of the factors specifically covered by the Commission's order instituting this investigation.
>
> . . . . . .
>
> "The Commission did not find that the resulting rates

There is no merit to the barge lines' suggestion that to fix reasonable differentials is to fix reasonable rates and that the two cannot be legally distinguished. The Commission did not even purport to test the reasonableness of the differentials by cost of service or any other accepted transportation criteria.* To deduct from existing all-rail rates differentials determined solely on the basis of the lower value of the barge-rail service furnishes no reason at all for assuming that the resulting joint barge-rail rates will return cost plus a reasonable profit, as appellees, including the Commission, well know.

In this connection, a basic inconsistency between the District Court's holding and its reasoning is illustrated by the following statement of the Court:

> "So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service."

Thus, while the Court held that the Commission need not consider relative cost of service, the whole reasoning

---

would be just and reasonable, nor did it find that they would be compensatory. They did not find that they reflected any reasonable relation in cost or other justifying circumstances between the all-rail service and barge-rail service and we ask the Court in our suggested findings to find that the Commission has not found the resulting rates were maximum reasonable rates, or not below maximum reasonable rates, and we also request the Court to find that the Commission has not found that the resulting rates would be even just and reasonable." Transcript of proceedings before the three-judge District Court, pages 15, 24-25.

* Commissioner Miller, the author of the Commission's report, in a separate statement on his own behalf said:

> "The differentials approved by this report are, in the final analysis, based largely on judgment and are necessarily more or less arbitrary." 270 I. C. C. at 620.

of the Court rests on the unsupported premise that joint barge-rail rates are fixed somewhere between all-rail rates and barge-rail operating costs. There is no such finding in the Commission's report, and the Court certainly had no basis for making such an unwarranted assumption.

The Commission's report referred to the embargoes placed against this joint traffic by the Mississippi Valley Barge Line Company (270 I.C.C. at 613) and to the substantial operating deficit incurred by the Federal Barge Lines over the years (270 I.C.C. at 595-6). Appellants respectfully submit that, based upon standards usually employed by the Commission for determining the reasonableness of rates, the Commission could not have found that the joint barge-rail rates which it prescribed were just and reasonable. The lack of such a finding cannot be deemed to have been mere oversight on the part of the Commission. The omission of any such finding is quite significant.

V.

Whether the Commission's Order Is Supported by Proper Findings Is a Question of Substance.

The District Court erred in holding that an ultimate finding in the language of the statute authorizing the Commission to enter the order was all that was required in the way of findings to sustain the order. It is now too well settled for argument that an order of an administrative agency must be supported by findings of the basic or essential facts which represent the determination of the agency as to the meaning of the evidence and which indicate that there is some rational or coherent relationship between the basic facts and the ultimate facts. *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 211-12. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S.

499, 504-5, 506, 510-11. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 463, 464. *Florida* v. *United States*, 282 U. S. 194, 215. *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554, 559, 560, 561, certiorari denied 305 U. S. 613. *Tri-State Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 564, 566. *Baltimore & O. R. Co.* v. *United States*, 22 F. Supp. 533, 536-7.

All that appellants ask is that the Commission make clear by its findings upon what legal theory it considered the differentials to be justified so that this Court may determine whether such a theory is a proper legal basis under the act for the Commission's order. Obviously, the Commission must indicate the rationale of its decision and must make clear "with a fair degree of assurance, why the Commission acts as it does." *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 212, *supra*. The lack of basic and preliminary findings is convincing proof that the Commission had no real basis for its order in the evidence. Congressional policy was the only basis expressed by the Commission as justification for the differentials. This Court has held that the validity of an administrative order must be tested on the grounds on which it was made. *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80. On such a test, the order lacks the legal and rational basis necessary to support it.

VI.

Whether the Commission's Order Is Supported by Substantial Evidence Is a Question of Substance.

Appellants have never alleged that there is any particular basic finding of the Commission which is not supported by evidence. Appellants simply contend that the Commission's ultimate findings and its order are not

supported by substantial evidence. This is sufficiently evident from the face of the Commission's report as shown by the lack of any findings of the basic facts. The Court is not required to search the record to determine if there is evidence to support the order. It is the duty of the Commission to make it clear by proper basic and preliminary findings that there is a rational basis for the order in the evidence.

Section 307(d) of the act provides that the Commission may prescribe joint barge-rail rates and differentials between them and all-rail rates only after full hearing. What this Court said in the *Chicago Junction Case,* 264 U. S. 258, 264-5, *supra,* is equally pertinent here:

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The barge lines try to dismiss this contention by giving the impression that there must be some evidence in a record of some 16,000 pages and 1500 exhibits which will support the order. But when the Commission specifically excludes any demonstrable economies in the barge-rail service as justification for the differentials and fails to point to any evidence which it does regard as justification for the differentials, appellants submit that a substantial question is raised as to whether the order is supported by the evidence.

CONCLUSION.

The questions raised by this appeal are substantial and important and affect the interests of a large number of shippers and carriers. It is believed that the Court should have the benefit of oral argument and briefs on the merits in this proceeding.

Respectfully submitted,

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APPENDIX.

Interstate Commerce Act, as amended:

NATIONAL TRANSPORTATION POLICY

[54 Stat. 899; preceding 49 U.S.C. § 1.]

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 307(d) [54 Stat. 937; 49 U.S.C. § 907(d).]

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such

carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. . . .

Inland Waterways Corporation Act, as amended by the Denison Act:

Sec. 3(c) [45 Stat. 979; 49 U.S.C. § 153(c)]
It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 45*

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLANTS IN NO. 45.

HAROLD E. SPENCER,
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DAVID O. MATHEWS,
JOHN E. MCCULLOUGH,
TOLL R. WARE,
Counsel for Appellants.

* Together with No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*, No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al., and* No. 48, *Savannah Sugar Refining Corporation, Appellant* v. *United States, et al.*, also on appeals from the same Court.

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IN THE

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Appellants,

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BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLANTS IN NO. 45.

OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (R. 173-184) is reported at 88 F. Supp. 982.

The report and supplemental report of the Interstate

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* Together with No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*, No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al.*, and No. 48, *Savannah Sugar Refining Corporation, Appellant* v. *United States, et al.*, also on appeals from the same Court.

Commerce Commission (R. 16-74, 75-77) are reported at 270 I. C. C. 591 and 274 I. C. C. 229.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. Code §§ 1253 and 2101(b), 62 Stat. 928, 962. The final decree of the District Court (R. 189-190) was entered January 12, 1950. The petition for appeal (R. 190-191) was filed and the order allowing appeal (R. 196-197) was entered on March 7, 1950. Probable jurisdiction was noted by this Court on May 15, 1950 (R. 460).

QUESTIONS PRESENTED.

1. Whether § 307(d) of the Interstate Commerce Act is a congressional mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

2. Whether, under the national transportation policy, the Commission may refuse to recognize appellants' inherent advantage of lower cost of service and prescribe differentials in favor of barge-rail service in spite of its finding that it can find no demonstrable economies in such service to justify the differentials.

3. Whether the Commission may deprive appellants of their inherent advantage of superiority of service by establishing differentials based on the inferiority of the barge-rail service.

4. Whether the Commission may establish joint barge-rail rates without finding that such rates are just and reasonable.

STATUTES INVOLVED.

This appeal involves the interpretation of the following statutory provisions:

Section 307(d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907(d)], which reads in part as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The national transportation policy, 54 Stat. 899, which precedes section 1 of the Interstate Commerce Act [49 U. S. C. § 1], and which reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized

officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 3(c) of the Inland Waterways Corporation Act, as amended by section 2 of the Denison Act, 45 Stat. 979 [49 U. S. C. § 153(c)], which reads in part as follows:

> "It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . ."

Other provisions of the Interstate Commerce Act and other statutes are also incidentally involved and are set forth in Appendix A, *infra*, pp. 63-69.

STATEMENT OF THE CASE.

This action was brought in the United States District Court for the Northern District of Illinois by appellants, who are common carriers by railroad, on behalf of themselves and all other common carriers by railroad similarly situated to set aside, annul, suspend, and enjoin an order of the Interstate Commerce Commission entered June 13, 1949, in *Rail and Barge Joint Rates*, No. 26712 on the Commission's docket. The Galveston, Texas, Chamber of Commerce, the Houston, Texas, Port and Traffic Bureau, the Railroad Commission of Texas, and the Savannah Sugar Refining Corporation, of Savannah, Ga., intervened in support of appellants. The Interstate Commerce Commission, Inland Waterways Corporation operating the Federal Barge Lines, Mississippi Valley Barge Line Company, American Barge Line Company, (hereinafter referred to as Federal, Valley, and American), the Baton Rouge, La., Traffic Bureau, the Memphis, Tenn., Freight Bureau, and the New Orleans, La., Traffic and Transportation Bureau intervened in defense of the Commission's order. A specially constituted Court of three judges upheld the validity of the order and dismissed appellants' complaint.

The order in question (R. 14-15) requires substantially all of the railroads in the United States, including appellants, to establish in connection with Federal, Valley, and American, which are common carrier barge lines operating on the Mississippi and Warrior Rivers, their tributaries and connecting waterways, certain through barge-rail routes and to apply over such routes between certain named key points joint barge-rail rates, made by deducting from the all-rail rates between the same points certain fixed differentials prescribed by the Commission and set forth in appendices to its report,* 270 I. C. C. at 622-641 (R. 55-74).

* The port-to-port all-water rates of the barge lines are not involved in this proceeding. This case involves only joint barge-

Pending disposition of this proceeding in the District Court and in this Court, the Commission has from time to time voluntarily postponed the effective date of the order. It is now to become effective on December 31, 1950, on not less than thirty days' notice.

Acting pursuant to the authority conferred on it by section 3(e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980,* the Commission, without a hearing, in 1929, in a proceeding known as Ex Parte No. 96, *Through Routes and Joint Rates,* 153 I. C. C. 129, granted to Federal a certificate of public convenience and necessity and established through routes and joint barge-rail rates between Federal and the rail carriers. It also established differentials between all-rail rates and the barge-rail rates, subject to certain limitations. The Commission devised a formula, commonly referred to as the Ex Parte 96 formula, for the purpose of determining what joint barge-rail rates and what differentials between them and the all-rail rates should be established. The joint rates in effect today are practically all based on this formula. This formula was designed to limit differential joint barge-rail rates to routes which would not be unduly circuitous and over which the barge line's portion of the haul would not be so short that the interchange expense would offset the assumed economies of water transportation. These limitations, which are referred to as the cir-

rail rates governing transportation partly by rail and partly by water and published in a single tariff under proper concurrences of both the water and rail carriers. Barge-rail and rail-barge rates, depending upon which carrier performs the initial service, are called two-way rates. Rail-barge-rail rates, where the water carrier performs only an intermediate service, are called three-way rates. Unless otherwise indicated, the term "barge-rail" as used in this brief includes barge-rail, rail-barge, and rail-barge-rail rates.

* Repealed, effective October 1, 1940, by section 320(e) of the Interstate Commerce Act, which was added by section 201 of the Transportation Act of 1940, 54 Stat. 950 [49 U. S. C. § 920 (e)]. These sections are set forth in Appendix A, *infra*, pp. 67-69.

cuity and relative-service limitations, are set forth in full in 153 I. C. C. at 136-7. Within the permissible limits, joint barge-rail rates were to be determined by deducting from the lowest all-rail rate on the traffic involved from origin to destination an indicated percentage (generally 20 per cent) of the lowest corresponding all-rail rate between the ports between which the shipment is transported by barge.*

Similar action was taken in 1930 in connection with Valley, *Application of Mississippi Valley B. L. Co.*, 167 I. C. C. 41, and in 1932 in connection with American, *Application of American B. L. Co.*, 182 I. C. C. 521. Federal is a corporation and agency of the United States Government, operating under the Secretary of Commerce. Valley and American are privately owned and operated.

In *United States v. Illinois Central R. Co.*, 291 U. S. 457, decided March 5, 1934, this Court upheld the constitutionality of the provision in section 4 of the Inland Waterways Corporation Act, which gave the Commission the right to establish joint rates and differentials without a hearing. The Court, however, pointed out that the United States and the Commission had conceded in brief and argument that they interpreted this section to mean that, if the rail carriers joined in the rates pursuant to the order and asked for a hearing, the Commission would be bound to grant a hearing and suspend the rates for the period provided by section 15(7) of the Interstate Commerce Act. As the Court said, "the position is definitely

* For example, if the all-rail rate on a certain commodity from New Orleans, La., to Centralia, Ill., was $1.50 per 100 pounds and the all-rail rate from New Orleans to Cairo, Ill., was $1.00 per 100 pounds, then, assuming that the indicated differential under the Commission's formula was 20 per cent, the joint barge-rail rate from New Orleans to Centralia, using barge to Cairo, thence rail would be $1.30 per 100 pounds, determined by deducting 20 cents (20 per cent of the all-rail rate between the ports between which the shipment is transported by barge) from the $1.50 all-rail rate from origin to destination.

taken that the order is tentative and the rates prescribed thereby cannot be enforced without a hearing if properly sought by appellees." 291 U. S. at 461.

Most of the joint rates prescribed by the Commission in the proceedings referred to had, however, already been established pursuant to the orders of the Commission. Therefore, on September 7, 1934, the railroads filed with the Commission three formal complaints under section 3(e) of the Inland Waterways Corporation Act, attacking the lawfulness of the through routes, joint rates and differentials which the Commission had prescribed. At the same time, a petition was filed seeking the reopening of various proceedings in which joint rates and differentials had been prescribed. The Commission thereupon, by an order dated October 8, 1934 (R. 78-80), instituted a general investigation, *Rail and Barge Joint Rates*, Docket No. 26712, among other things, into the reasonableness and lawfulness otherwise of existing through routes and joint rates and the reasonableness of existing minimum differentials "with the view to . . . prescribing such just, reasonable, and otherwise lawful joint rates, rules, regulations, and practices and such reasonable minimum differentials, if any, as the facts and circumstances shall appear to require." (R. 80.) Consolidated for disposition with the general investigation were the three formal complaints filed by the railroads and certain other proceedings involving the same general questions.

Hearings before the Commission began March 20, 1935, and were completed March 19, 1943. There was before the Commission a record of 16,440 pages of testimony and 1,475 exhibits.

In view of the nature of the questions raised by this appeal, it is not considered necessary to refer extensively to the evidence before the Commission, and counsel for all parties have entered into a stipulation that the testimony

and exhibits before the Commission should not be printed but that they should stand as part of the record on appeal as original exhibits, to which any party and the Court might refer (R. 458-9). While appellants contend that the Commission's order is unsupported by the evidence before the Commission, appellants do not ask the Court to examine such evidence for the reason that appellants contend that the Commission's report shows on its face that the Commission did not even purport to base its order on the record before it.

It is, therefore, necessary to review only briefly the evidence before the Commission. The most important part of the record before the Commission dealt with cost of service. Referring to this evidence, the Commission said in its report, 270 I. C. C. at 603 (R. 32):

> "*Cost of service.*—Approximately one-fourth of the record deals with cost of transportation service by rail and barge. At the outset of the hearings the railroads announced their intention of showing 'that the cost of transporting freight by barge-and-rail routes is not less than the cost of transporting freight by the all-rail routes, that the fact of the matter is that the all-rail routes are far more economical than the barge-and-rail routes' contrary to the view theretofore widely held and frequently expressed that water transportation, including that performed by the barge lines, is inherently cheaper, as a general proposition, than rail transportation. Federal and Valley accepted the challenge in this assertion."

After describing briefly the cost evidence presented by the parties, the Commission continued, 270 I. C. C. at 604 (R. 33):

> "All of the evidence bearing on cost of service was referred for study to our cost section which was at that time part of our Bureau of Transport Economics and Statistics, hereinafter referred to as the cost section. At a further hearing a 'restatement and

summary of rail and barge cost data' with supporting details was introduced in evidence by members of the staff of the cost section who reached the general conclusion—

> that the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic."

Evidence in the nature of comment and criticism of the restatement of the cost section was introduced by the parties, and supplemental briefs were filed. Concerning such evidence, the Commission said, 270 I. C. C. at 604 (R. 33):

> "No useful purpose would be served by reviewing these criticisms with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail."

It should be noted, however, that, although the Commission made no finding with respect to the actual relation between all-rail and barge-rail costs during the period which the cost studies covered because of changes in conditions which had occurred since that time, no inference was made by the Commission and none is to be drawn from its report that the relative cost levels had changed in favor of the barge lines during the intervening period. In fact, the Commission refers in its report to testimony of the president of Federal before a subcommittee of the House of Representatives in April, 1947, in which he referred to the effect of the high cost of terminal handling upon merchandise traffic of the barge lines, 270 I. C. C. at 605-6 (R. 34-5). Again, it should be borne in mind that this case involves only traffic handled over joint barge-rail

routes, which must necessarily incur this expensive terminal handling.

The Commission concluded its discussion of the cost evidence before it with the following finding, 270 I. C. C. at 606 (R. 36):

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials."

Considerable testimony was also presented by shippers. This testimony is reviewed in the Commission's report, 270 I. C. C. at 606-9 (R. 36-9), and with respect thereto the Commission observed, p. 609 (R. 39):

> "The shippers' evidence is chiefly of significance because it indicates a fairly unanimous view that the principal object in shipping by barge is to save transportation expense."

There then follows in the Commission's report an entire section entitled, "THE JUSTIFICATION FOR DIFFERENTIALS." This section bears the sub-title, "*Congressional policy*," and is devoted entirely to a discussion of congressional policy with respect to barge-rail transportation in the Mississippi Valley. The Commission referred to the so-called policy of Congress to "afford to the people of a large part of the country the economies of cheaper transportation by water" and to the policy of Congress to continue the services of Federal until "there shall have been published and filed . . . such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers." The Commission concluded, therefore, 270 I. C. C. at 610 (R. 40):

"In the light of legislative history the term 'priv-

ileges of joint rail and water transportation' must be understood as referring to barge-and-rail rates lower than all-rail rates."

The Commision referred, 270 I. C. C. at 611 (R. 41-2), to the arguments of the rail carriers based upon the national transportation policy and stated, p. 611 (R. 42):

> "Urging that no such advantage exists today, so far as the facts before us show, the rail respondents contend that they should now be found to have an inherent advantage even though the necessary consequence of such a finding would be tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley."

The Commission rejected the rail carriers' arguments based on the national transportation policy in the following language, 270 I. C. C. at 611-12 (R. 42-3):

> "We are unable to accept this argument based on the national transportation policy. In the past several years Federal has received continuing consideration by congressional committees on appropriations as well as others. It definitely appears from that consideration that Federal is deemed to be performing a pioneering function for the purpose among others of demonstrating the advantages of joint barge-and-rail transportation in the belief that such service eventually will prove to be economical. It is not for us to say that the experiment should now come to an end."

At no place in its discussion of the justification for differentials does the Commission refer to any of the rate-making provisions of the Interstate Commerce Act, nor is any attempt made to pass upon the reasonableness or lawfulness otherwise of the joint rates and differentials from the standpoint of any transportation circumstances and conditions. The discussion of the justification for differentials was concluded by the Commission with the following ultimate finding, 270 I. C. C. at 613 (R. 44):

"Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified."

Believing that the Commission had misconstrued the law and its own statutory power, that the reasons assigned by the Commission as justification for imposing differentials on the all-rail routes were not legally sufficient to support its action, and that the Commission's order was not supported by necessary findings and substantial evidence, appellants filed their complaint to set aside and enjoin the Commission's order. It was duly heard by a District Court of three judges as provided by law. On January 12, 1950, the Court entered an opinion, findings of fact, conclusions of law, and a final decree dismissing the complaint. The Court held that the Commission had not misconstrued the law as contended by appellants and that the Commission's order was supported by proper findings and evidence. The case is here on direct appeal from the order of the District Court.

SPECIFICATION OF ERRORS.

Appellants rely upon all the errors assigned in their Assignment of Errors (R. 192-5). The basic errors of the District Court, however, may be summarized as follows:

1. The Court erred in failing to set aside the order of the Commission on the ground that the establishment of differentials in favor of the inferior barge-rail service, without a finding that the service costs less to perform than all-rail service, deprives plaintiffs of their inherent advantages of lower cost of service and superiority of service in violation of the national transportation policy.

2. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's finding that differentials between all-rail rates and joint barge-rail rates are justified is inconsistent with, unsupported by, and contrary to its finding that it could not find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries which, from the standpoint of cost of service, would justify differentials.

3. The Court erred in failing to set aside the order of the Commission on the ground that, where differentials are not justified by transportation circumstances and conditions, the Commission is without power to establish differentials on the theory that they are required by general expressions of congressional policy with respect to water transportation.

4. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's order was based upon a misconstruction of the Interstate Commerce Act and the national transportation policy.

5. The Court erred in failing to set aside the order of

the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are just and reasonable and in the absence of preliminary and subsidiary findings of fact on which such an ultimate finding could rationally be based.

6. The Court erred in failing to set aside the order of the Commission on the ground that no rational basis for the order is shown by the Commission's findings.

7. The Court erred in failing to set aside the order of the Commission on the ground that the order was not supported by substantial evidence.

8. The Court erred in dismissing appellants' complaint.

SUMMARY OF ARGUMENT.

When two modes of transportation are competing for the same traffic, the prescription of a fixed rate differential between them imposes a competitive handicap on the carrier required to maintain the higher rates. This can be justified under the Interstate Commerce Act only if the differential is for the purpose of protecting an inherent advantage of the carrier in whose favor it is made and only if the differential is shown to be reasonable according to transportation standards. Otherwise, the differential is only for the purpose of allowing an inferior service to compete on more nearly equal terms with a superior and more efficient service and such a differential is merely an arbitrary penalty, which the Commission has no power to impose.

After years of hearings, upon a massive record, the Commission made the following finding, 270 I. C. C. at 606 (R. 36):

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials."

While the Commission did not make a finding as to the actual relation of all-rail versus barge-rail costs during the period covered by the cost studies because of changes in both rail and barge costs since that time, in no way does this impair the validity of its finding that there are no demonstrable economies in the barge-rail service which will justify differentials.

The Commission was well aware of the fact that, at least at the time of the hearings, the conclusion of its own cost section was that the all-rail costs were less than the barge-rail costs and that important factors contributing to this result were the high terminal costs of the barge lines and the added terminal handlings required on the joint traffic. 270 I. C. C. at 604 (R. 33). Certainly, the Commission did not infer that the relative cost levels had changed in favor of the barge lines during the intervening period. Indeed, all inferences were to the contrary. The Commission was aware of and mentioned in its report the continuing operating deficits of Federal, 270 I. C. C. at 595-6 (R. 22), and the fact that the privately operated Valley had placed embargoes against the joint traffic "in order to avoid a serious loss of revenue owing to the expense of transferring freight between barges and railroad cars." 270 I. C. C. at 606 (R. 35-6); see also R. 340-1. The Commission also referred to the testimony of Federal's president before a House subcommittee as to how the high cost of terminal handling was affecting both Federal and the private lines. 270 I. C. C. at 605-6 (R. 34-5).

The Commission could see, of course, without mak-

ing a detailed finding as to costs, that there were no economies in the barge-rail service to support differentials. And in the view the Commission took of the matter, it made no difference whether there were such economies or not.

If, therefore, this is a finding that there are no economies in the barge-rail service which will justify differentials, then the prescription of differentials in the face of such a finding deprives appellants of their inherent advantages of lower cost of service and superiority of service in violation of the national transportation policy.

But even if, as appellees contend, this is merely a finding that the Commission can make no finding as to whether there are any demonstrable economies in the barge-rail service which will justify differentials, the Commission's order is equally unlawful for the reason that the Commission has no power to confer on the barge-rail routes an arbitrary rate advantage for which no affirmative justification is disclosed by the Commission's findings. Furthermore, even if the all-rail and barge-rail costs were exactly the same, the prescription of differentials in favor of the barge-rail routes to offset the superiority of the all-rail service would still deprive appellants of their inherent advantage of superiority of service for this, too, is entitled to protection under the national transportation policy.

Even if the Commission had not clearly misconstrued the policy of Congress, the fact that the Commission's order is purportedly based upon general expressions of policy rather than on the transportation standards of the Interstate Commerce Act in itself shows the arbitrary character of the order. This Court has made it clear that the Commission has no authority to base an order on general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *United States* v. *New*

York Central R. R., 263 U. S. 603. Its order must be based on the substantive provisions of the Interstate Commerce Act, and the rates and differentials prescribed must be reasonable and otherwise lawful according to transportation standards. Even the national transportation policy itself, which the Commission ignored, does not give the Commission any arbitrary power to carry out general declarations of policy. It states that all the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the declaration of policy. Yet at no place in the Commission's report is there any indication that the Commission tested the prescribed rates and differentials by the transportation standards of the Interstate Commerce Act. There is not even a finding that the prescribed rates are just and reasonable or that they would cover the cost of operation of the barge-rail service. There is nothing in the Commission's report to indicate that it had any reason for its decision except a belief that it was carrying out a policy of Congress for the establishment of joint rates and differentials.

But, even so, the Commission clearly misconstrued the plain terms of the Interstate Commerce Act and the policy of Congress in two important respects. It admittedly gave no effect to the national transportation policy which requires it to preserve the inherent advantages of all modes of transportation, rail as well as water, and it erroneously interpreted section 3(c) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 979 [49 U. S. C., § 153(c)], as requiring it to prescribe differentials even though it could find no demonstrable economies in the barge-rail service which would justify them.

Interstate Commerce Commission v. Mechling, 330 U. S. 567, established the principle that the lower cost of op-

eration of the barge carrier there involved was an inherent advantage and that the Commission had no discretion to approve any type of rates which would reduce or take away this inherent advantage. The "fair and impartial regulation" guaranteed by the national transportation policy requires that the same rule be applied to protect the inherent advantages of the rail lines. That such was the intent of Congress is shown beyond doubt by the legislative history of the Transportation Act of 1940.

To be sure, to the extent that the expenditure of enormous sums of the public money for navigable waterways permits barge lines to operate more cheaply than other carriers, such operations are to be protected by the Commission. However, nothing could be clearer from the legislative history of the Transportation Act of 1940 than that in situations where, even with all these advantages, the barge lines cannot compete efficiently and economically with the rail carriers, the inherent advantages of the rail lines are to be recognized and preserved. Congress did not intend that, in addition to direct subsidies, the barge lines should also be indirectly subsidized at the expense of the rail carriers by economically unjustified differentials.

Nor is section 3(c) of the Inland Waterways Corporation Act, as amended, upon which the Commission so heavily relied, any legal basis for the Commission's order. It is nothing more than a general expression of Congressional policy for the establishment of joint rates on terms reasonably fair to both rail and water carriers. It sets up no substantive standards for the establishment of such rates. It does not indicate that any preference is to be given the water carriers. Like section 500 of the Transportation Act of 1920, construed by this Court in *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 288, the most it can mean is that there shall be "impartial recognition and promotion of the interests of all."

The Commission cannot properly discharge its duty under the Act to recognize and preserve the inherent advantages of all modes of transportation without giving effect to evidence of relative cost of service. Throughout the whole history of these differentials, the Commission has always assumed that they were justified by economies in the barge-rail service. In *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, 144, the Commission pointed out that the differentials are based upon the premise that the barge service costs less and is worth less than the rail service. The Commission also said:

> "From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

Federal itself, as late as 1945, insisted that "the prime reason for differential rates is not the disability of the service by water but the lesser cost of operation by water than by rail." *Inland Waterways Corp.* v. *Southern Ry. Co.*, 263 I. C. C. 227, 234. See R. 41.

If, as appellees contend, it is not necessary to find any economy in the barge-rail service to justify the differentials, what can justify diverting the traffic from the all-rail to the barge-rail routes? Certainly not the inferiority of the barge-rail service for that would deprive the rail carriers of one of their inherent advantages. Nor would the mere willingness of the barge lines—especially one whose losses are borne by the taxpayers—to bear the burden of the differential justify the Commission in preventing a superior, lower-cost service from meeting the competition of an inferior, higher-cost service. What, then, will justify the differentials? That is the question appellees must answer, for the Commission has no right to prescribe differentials and divert the traffic from the all-

rail routes in the absence of affirmative justification therefor.

The findings of the Commission disclose no legal theory upon which the differentials can be justified, nor are there any findings of the basic facts from which the Commission's ultimate finding can be rationally or logically inferred. After excluding economy of the barge-rail service as a justification for these differentials, the Commission pointed to no other evidence which it did regard as such justification. The Commission's order is, therefore, clearly unsupported by essential findings and substantial evidence.

Commissioner Woodlock, in his concurring opinion in *Through Routes and Joint Rates*, 153 I. C. C. 129, 138-9, stated with great clarity the problem confronting the Commission as a result of the Denison Act. In part, he said:

> "It is the intent of Congress, clearly and definitely expressed in the statutes, that water transportation shall be encouraged to the end that the people may derive whatever true economic benefits may inhere therein. It is equally the intent of Congress that our national railroad system shall be preserved in full vigor. There is no necessary economic contradiction between the two intents and both are manifestly 'in the public interest.' Traffic will move by water only when it is more advantageous so to move it than to move it by rail. In general the inducement must take the form of lower rates. The public is entitled to the lowest rates that water-line carriers can offer, and still make a reasonable profit from the traffic. Whatever business is diverted by such rates from the rail lines is properly so diverted. But if both rail and water lines are to be preserved in full vigor, the total traffic must support both. Neither can properly prey upon the other. Water-line owners can not expect rail-line owners to support them, or vice versa.
>
> "In 151 I. C. C. 126 and 151 I. C. C. 91, and in the instant case, we are making a preliminary insertion of the water lines into our national transportation

> system. We are here prescribing joint through rail-water rates over a large part of the United States. We are doing it summarily because Congress told us to do it. We do not know whether the level of the rates prescribed is or is not, in fact, the proper level. We found the differential in existence as a relic of the war and we continue it. It may be too high, or it may be too low; we have not here the evidence on which to determine the question."

He went on to say that with respect to the problems confronting the Commission and the public "it is evidence and not propaganda which is required," 153 I. C. C. at 139. In the case now before the Court, the Commission had the evidence but refused to give any effect to it. It prescribed differentials although it could find no demonstrable economies or "true economic benefits", as Commissioner Woodlock called them, in the barge-rail service which would justify differentials. This it cannot lawfully do.

ARGUMENT.

I.

The Commission's Order, Being Based Upon General Expressions of Congressional Policy Rather Than Upon the Substantive Provisions of the Interstate Commerce Act, Is Not a Valid Exercise of the Commission's Power to Prescribe Differentials Under Section 307(d) of the Interstate Commerce Act.

A mere reading of the section of the Commission's report entitled, "THE JUSTIFICATION FOR DIFFERENTIALS", 270 I. C. C. at 609-13 (R. 39-44), leads to the inescapable conclusion that the Commission did not even purport to test the reasonableness and lawfulness otherwise of the rates and differentials which it prescribed by any substantive provisions of the Interstate Commerce Act. It made no attempt to base its order on the evidence before it. The order is clearly based upon the Commission's interpretation of certain general expressions of congressional policy as a mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

It has already been pointed out, *supra*, pp. 11-12, how the entire section of the Commission's report entitled, "THE JUSTIFICATION FOR DIFFERENTIALS" is devoted to a discussion of congressional policy with respect to water transportation and how the Commission specifically rejected the arguments of the rail carriers based upon the national transportation policy because it considered that recognition of the inherent advantages which appellants claimed would be "tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-

rail rates in the Mississippi Valley." 270 I. C. C. at 611 (R. 42).

There is no discussion of the reasonableness of the rates under sections 1(4) or 1(5) (a) of the Act. There is no discussion of appellants' and interveners' allegations that the rates cause undue preference and prejudice among shippers in violation of section 3(1) of the Act. There is no discussion of the factors which section 15a(2) of the Act requires the Commission to take into consideration in the exercise of its power to prescribe just and reasonable rates. Yet, the power of the Commission to prescribe joint rates is subject to all these sections of the Act. Nor does the Commission point to any evidence before it which it regards as justification for the differentials. It simply regards the policy of Congress as requiring differentials regardless of any transportation circumstances and conditions.

That the Commission made no real attempt to determine whether the differentials were justified by the evidence is conclusively demonstrated by its statement referring to the so-called experiment of joint rates that, 270 I. C. C. at 612 (R. 42-3): "It is not for us to say that the experiment should now come to an end." By its own admission, the evidence before the Commission had no bearing on the result reached.

The Commission clearly misconceived its duty under the Act. It was not the duty of the Commission to determine whether the experiment should or should not come to an end, but it was its duty to determine whether the joint rates and differentials before it were reasonable and otherwise lawful in accordance with recognized transportation standards, for the standards of the Act are transportation standards, not criteria of general welfare. *Texas & Pacific Ry. Co.* v. *Unted States*, 289 U. S. 627, 638. This duty and responsibility the Commission abdicated.

Passing for the moment the fact that the Commission obviously misconstrued and violated rather than carried out the intent of Congress, the mere fact that the Commission rested its order on a general expression of congressional policy in the Inland Waterways Corporation Act rather than on the substantive provisions of the Interstate Commerce Act is in itself an error of law sufficient to vitiate its order.

It is well established by decisions of this Court that orders of the Commission must be based upon the substantive transportation standards of the Interstate Commerce Act rather than upon mere general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. *United States* v. *New York Central R. R.*, 263 U. S. 603. In each of these cases, the Court set aside an order of the Commission which had the same defect as the order here involved.

In the *Ann Arbor* case, this Court had under consideration the so-called Hoch-Smith Resolution, 43 Stat. 801, [49 U. S. C. § 55], which had directed the Interstate Commerce Commission to effect such "lawful changes" in the rate structure as would promote freedom of movement by common carriers of the products of agriculture affected by the existing depression in agriculture at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. The Commission had construed that resolution as making certain changes in the basic law and as justifying certain reductions in rates. The Court set the order aside, saying:

> "The original and supplemental opinions of the commission show quite plainly that the commission based the order entirely upon the joint resolution . . . True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint reso-

lution when construed as the Commission construed it, and not that they were deemed unreasonable under § 1(5) or § 3(1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the Commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections, but believed by it to have been brought into the problem by the resolution.

. . . . . .

"The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it.

. . . . . .

"We are of opinion that the Commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law." 281 U. S. at 665-6, 668.

The similarity of the present case to the *Ann Arbor* case is striking. Here, too, the report of the Commission shows quite plainly that the Commission based its order entirely upon a general expression of congressional policy. True, in its report, it said that differentials between barge-rail and all-rail rates were justified, 270 I. C. C. at 613 (R. 44), but its report taken as a whole shows that it deemed the differentials justified because of a general expression of congressional policy when construed as the Commission construed it and not because the differentials were justified as reasonable differentials according to the transportation standards of the rate-making sections of the Interstate Commerce Act. Throughout the report of the Commission, it is manifest that the Commission was testing the validity of the rates and differentials by considerations

which were not applicable under the substantive provisions of the Interstate Commerce Act.

In *United States* v. *New York Central R. R.*, 263 U. S. 603, the Commission had ordered the railroads to issue certain scrip tickets at a 20 per cent reduction from face value, apparently on the ground that this was required by congressional policy. In setting aside the order, this Court said:

> "It is further alleged in the bill that the conclusion stated by the Commission that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel, is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion or ruling reached by it upon a misinterpretation of the law. This was the view taken by the three judges who sat in the District Court. They held that the Commission considered that the amendment of 1922 either required it to make a reduction, or at least showed a spirit and purpose that should be deferred to, and on that ground came to a result that otherwise would not have been reached. They held that, therefore, the order could not stand, considering that the amendment of 1922 like the rest of the Interstate Commerce Act called for an unbiased opinion upon the merits of the case.
>
> . . . . . .
>
> "After thus excluding the grounds upon which the order could be justified the Commission held that the obvious spirit and apparent purpose of the law required that the experiment should be tried, and on these premises declared that the rates resulting from the reduction of 20 per cent would be 'just and reasonable for this class of travel.' It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, and therefore that the present order cannot stand." 263 U. S. at 609-10, 611.

It seems as plain in the case at bar as in the *New York Central* case that the Commission was not prepared to make its order on independent grounds apart from the supposed congressional policy. In fact, it said so in plain language. If its order cannot be supported under the substantive provisions of the Interstate Commerce Act, clearly then, under the doctrine of the *Ann Arbor* and *New York Central* cases, it cannot be supported on the theory that the order is based upon a general expression of congressional policy in the Inland Waterways Corporation Act.

II.

Section 307(d) of the Interstate Commerce Act Is Not a Congressional Mandate for the Prescription of Differentials Between All-Rail and Barge-Rail Rates Regardless of Relative Cost of Service or Other Transportation Circumstances and Conditions.

A. The Plain Words of Section 307(d) of the Act and the National Transportation Policy and the Legislative History of the Transportation Act of 1940 Clearly Show That the Barge Carriers Are Not to Have Any Rate Advantage Over Other Modes of Transportation to Which They Are Not Entitled by the Economy of Their Service.

Section 307(d) of the Act confers on the Commission the power to establish "whenever deemed by it to be necessary or desirable in the public interest, after full hearing," through routes and joint rates between carriers by rail and carriers by water. That section also provides that the Commission "shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates."

The words of the statute are plain in and of themselves. They clearly are not a mandate for the prescription of differentials without regard to cost of service or other transportation circumstances and conditions, nor do they con-

fer on the Commission any arbitrary power to prescribe differentials in the sole discretion of the Commission regardless of the evidence before it. Yet exactly such arbitrary power was arrogated by the Commission when it held that it could prescribe differentials between all-rail and barge-rail rates regardless of the fact that it could find no demonstrable economies in the barge-rail service which would justify the differentials. Interpreted as the Commission interpreted it, and as appellees would have this Court interpret it, there would be a serious question as to the constitutional validity of section 307(d). Cf. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, 669.

But the Act gives the Commission no such power. It requires the differentials to be justified, and it requires them to be reasonable. This obviously means reasonable by transportation standards for the standards of the Act are transportation standards. The Commission is required to decide this case in accordance with the evidence before it. If there is no rational relationship between its findings of fact and its conclusion, its order is arbitrary and void.

Arguments similar to those advanced here by appellees were rejected by this Court in the *Chicago Junction Case*, 264 U. S. 258, 264-5, where the Court said:

> "it is further contended that paragraph 2 of § 5 confers a power purely discretionary, and that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence. The power here challenged is not of that character. Congress by using the phrase 'whenever the Commission is of the opinion, after hearing,' prescribed quasi-judicial action.* Upon ap-

*In a footnote the Court said: "The same phrase is used in the Interstate Commerce Act in respect to many other classes of orders. These orders, so far as considered by this Court, have uniformly been held to be subject to judicial review; and where an essential finding was unsupported by evidence, the order was declared to be void." (citing cases)

> plication of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

And this Court, in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574, in referring specifically to section 307(d), said:

> "But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates."

The national transportation policy states that all provisions of the Act are to be administered and enforced with a view to carrying out the declaration of policy. Any lingering doubts, if any there could be, as to the meaning of section 307(d) are set at rest by the national transportation policy. Differentials are justified and reasonable only to the extent that they accord to all modes of transportation "fair and impartial regulation . . . so administered as to recognize and preserve the inherent advantages of each." 54 Stat. 899.

The Commission specifically rejected appellants' arguments based on the national transportation policy because the Commission felt that somehow the recognition of appellants' inherent advantages would be "tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611 (R. 42). The Commission professed to discern such a policy from a general expression of policy in the Inland Waterways Corporation Act.

How the Commission could have reached such a conclusion directly in the face of the clear and explicit language of the national transportation policy is beyond comprehension for nothing could be clearer than the words Congress used in its declaration of the national transportation policy to express its intentions in this respect.

Senator Wheeler, chairman of the Senate Committee on Interstate Commerce, said on the floor of the Senate:

> "... we are stating that it is the policy of the Congress of the United States that the Interstate Commerce Commission shall treat each and every one of these forms of transportation upon an equal basis; and no language could be written into law that more clearly directs that that should be done than we have done in the Interstate Commerce Committee." 84 Cong. Rec. 6073.*

In the House, Congressman Halleck, a member of the Committee on Interstate and Foreign Commerce, said:

> "The object of this legislation is to coordinate and stabilize fundamentally all of the transportation systems of this country and to put them on a fair and equal basis and to preserve the inherent advantages of every type of transportation. You cannot read anything else in it in any line or at any place. This is a matter of equity and of fairness." 84 Cong. Rec. 9712.†

Congress obviously intended that any inherent advantage which any carrier had by reason of its lower operating cost or the superiority of its service should not be taken away or reduced by any arbitrary adjustment of rates. The purposes and intent of the Transportation Act of 1940 in this respect are clear to anyone. Yet, in spite of the clarity of Congress' direction to recognize and preserve the inherent advantages of all modes of transportation, the Commission refused to recognize those of the rail carriers.

* See Appendix B, *infra*, p. 72.

† See Appendix B, *infra*, p. 73.

In its report* on S. 2009, which later became the Transportation Act of 1940, the Senate Committee on Interstate Commerce said (p. 3):

> "Consequently the remaining remedy is to so extend regulation to competing forms of transportation, other than air, which only recently was placed under the Civil Aeronautics Authority, and retaining to each such lawful advantages as are inherent therein, so as to, as nearly as possible, equalize them and put them on a common footing, at least from a regulation standpoint. This is not for the purpose of favoring one form of transportation over another or seeking to put any form of transportation out of business; it is, as stated, simply to put them all on a common basis or common starting point in their sharp struggle for business. S. 2009 seeks to do this also. If one or more forms of transportation cannot survive under equality of regulation, they are not entitled to survive. This is not railroad philosophy; it is transportation philosophy. The problem is not a railroad problem, but is, as the Interstate Commerce Commission has said, a transportation problem."

Likewise, in its report† on S. 2009, the House Committee on Interstate and Foreign Commerce said (p. 3):

> "COORDINATION OF RATES.
>
> "The manifest difference in the economic advantages of transportation by water, highway, and rail makes the question of rate adjustment as between these carriers a practical question. The bill is so drawn as to make it plain that there is no purpose to so adjust rates as to deprive any type of carrier of the inherent advantage of his cheaper cost of carriage.
>
> "A proper coordination of rates requires a proper regard for the advantages of one type over another as manifested in the rate charges."

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* Senate Report No. 433, 76th Congress, 1st Session.

† House Report No. 1217, 76th Congress, 1st Session.

It is well here to recall something of the background of the Transportation Act of 1940. For some years prior to the enactment of the Transportation Act of 1940, the railroads had experienced exceedingly trying times. Many were in financial difficulties. The President of the United States himself on several occasions had recommended that steps be taken to put the railroads on a firmer financial footing. Various committees were appointed to study the problem. It was widely recognized that, in the interest of a strong, efficient national transportation system, the highly regulated railroads ought not to have to compete with unregulated water carriers. Legislation was introduced in Congress to bring the water carriers under regulation. In general, the established water carriers themselves were in favor of such regulation. The proposed legislation finally culminated in the Transportation Act of 1940. This Act was passed over bitter opposition, yet seldom had proposed legislation had more thorough consideration.

In discussing this measure on the floor of the Senate, Senator Wheeler, chairman of the Senate Committee on Interstate Commerce, said:

> ". . . I venture the assertion that the bill was given more careful and more thorghtful consideration than any other bill which has ever come before the Senate in my time." 86 Cong. Rec. 11270.

Every conceivable safeguard was written into the Act to protect the water carriers. Congress was acutely aware of the hundreds of millions of dollars of public money spent to make the inland waterways navigable. To the extent that the expenditure of such sums made it possible for the water carriers to operate more cheaply than other modes of transportation, Congress intended that such operations should be protected.

But where the expenditure of public money still did

not allow the water carriers to compete economically with other forms of transportation, Congress certainly did not intend that rate differentials should be established in favor of the water carriers. Congress did not immunize them against the competition of a superior, more efficient service. It did not provide that no matter how uneconomical a service might be rendered at the expense of the taxpayers, the barge lines were entitled to differentials simply because they were barge lines. The purpose of the Act was not to force traffic over uneconomical routes but to coordinate competing modes of transportation and, by fair and impartial regulation, to encourage each within the field in which it had inherent economic advantages. The purpose of the differentials provided by Congress was, therefore, to protect existing economic advantages, not to create arbitrary rate advantages.

If this is not sufficiently clear from the words of the Act itself, the legislative history of the Transportation Act of 1940 leaves no doubt about it. Representative excerpts from several congressional debates have been included herein in Appendix B, *infra*, pp. 70-75. There is no question but what Congress meant exactly what it said when it decreed that the inherent advantages of all modes of transportation should be recognized and preserved. It will also be noted that the federal subsidies for the development of water transportation were regarded by Congress as one of the main reasons why the water lines should receive no special rate advantages. Clearly, Congress intended that both the rail and water carriers should operate under the same set of regulatory rules fairly and impartially administered. Congress intended that there should be differentials in favor of barge-rail service only where justified by the economy of the service. It never intended that there should be differentials solely as a matter of law.

B. The Prescription of Differentials Between All-Rail and Barge-Rail Rates Which Are Not Justified by Economy of the Barge-Rail Service But Which Are for the Purpose of Offsetting the Inferiority of That Service Deprives Appellants of Their Inherent Advantages Contrary to the National Transportation Policy.

The decision of this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, makes it clear that, in construing the provisions of the Interstate Commerce Act, the Commission is bound by the provisions of the national transportation policy. The Commission has no discretion to prescribe rates or differentials which will deprive a carrier of its inherent advantages contrary to the national transportation policy. Therefore, any differentials which are not for the purpose of preserving an existing inherent advantage of the barge lines but are for the purpose of creating an arbitrary rate advantage cannot possibly be "justified" as "reasonable" differentials within the meaning of section 307(d) since they deprive the rail carriers of their inherent advantages of lower cost of service and superiority of service. The Commission has no discretion to declare such differentials "justified" or "reasonable" in the absence of evidence proving that they are in fact in accordance with the dictates of the statute.

Appellants understand the holding in the *Mechling* case to be that the conceded lower operating cost of the barge carrier there involved was an inherent advantage which the Commission must recognize and preserve, for Congress has left the Commission no discretionary power to approve any type of rates which would reduce this inherent advantage. In that case, this Court said:

> "It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition." 330 U. S. at 579.

If it is not within the province of the Commission to protect the traffic of the railroads from barge competition, as this Court held in the *Mechling* case, then it certainly is not within the province of the Commission arbitrarily to divert traffic from all-rail to barge-rail routes or to immunize the barge carriers against rail competition when that competition results from the ability of the rail carriers to render a superior service at lower cost. The "fair and impartial regulation" called for by the national transportation policy demands that the rule of the *Mechling* case be applied impartially and that it protect the inherent advantages of the rail carriers to the same extent that it protects those of the barge carriers.

The argument of appellees that the *Mechling* decision compels the Commission to establish differentials in favor of the barge carriers without regard to the economy of the service and the misconstruction of that decision by the District Court in its opinion show that appellees and the District Court do not understand the fundamental factual difference between that case and this. In the *Mechling* case, the Commission had found the rates of the barge carrier to be reasonable, and this determination was accepted by this Court.* The Court also assumed that the rail rates west of Chicago, which were competitive with the barge carrier involved, were "fair and reasonable for the services performed." 330 U. S. at 582. Thus, the reasonableness of the barge rates, the reasonableness of the rail rates which were competitive with the barge rates, and, consequently, the reasonableness of the difference between them were all accepted by the Court as having been established, and the question was whether the rail carriers east of Chicago could charge higher rates for carrying ex-

* See footnote 10, 330 U. S. at 578, where the Court said: "The Commission stated that 'The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding may be accepted as reasonable.' 262 I. C. C. 7, 19."

barge grain than for carrying ex-rail or ex-lake grain between the same points.

In the present case, on the contrary, the intrinsic reasonableness of the joint barge-rail rates and the reasonableness of the differentials between them and the all-rail rates are the very facts at issue, for the determination of which the Commission instituted its investigation in *Rail and Barge Joint Rates* (R. 79-80). Furthermore, as will be shown more fully later, *infra*, pp. 51-52, the rail lines ask no more for transporting traffic which moves beyond their lines by water than they ask on traffic which moves beyond their lines by rail. This is another important factual difference between this case and the *Mechling* case. It is not the rail lines with which the barge lines connect which object to these unjustified differentials. It is the rail lines with which the barge lines compete.

In *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, 144, the Commission had said:

> "The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

In referring to this statement of the Commission, the District Court said, 88 F. Supp. at 986 (R. 178):

> "Moreover, it is not at all clear that the lesser cost of the service, which is characterized as 'the important factor,' from the standpoint of public policy, on which rate differentials are based, means lower *operating costs;* rather does it seem more likely that the phrase means lower *costs to the public.*"

The *Mechling* case was cited by the District Court in support of this statement. Obviously, however, the

Mechling case is to the contrary, and the District Court's opinion not only ignores the clear purport of the *Mechling* decision but the specific language of this Court, when it said:

> "Although barge lines were much slower than railroads, they were less expensive to operate and therefore could afford to transport freight much more cheaply than railroads." 330 U. S. at 570.

How could "less expensive to operate" mean anything but lower operating costs? How could it possibly mean lower costs to the public? Obviously, the lower operating costs of the barge line involved in the *Mechling* case were the controlling factor in this Court's decision in that case. What the District Court overlooked was that the lower rates of the barge-rail routes today are not due to any inherent advantage of lower operating costs but are due to orders of the Commission preventing the all-rail routes from meeting the rates of the barge-rail routes. Now that the Commission realizes that the assumption on which these rates and differentials were based was false, the evil ought to be undone.

The suggestion of the District Court that the rail carriers cannot be found to have an inherent advantage because the cost evidence before the Commission was stale is likewise without merit. In the first place, it has already been pointed out, *supra*, pp. 10, 16, that the Commission was dealing with relative cost of service and that there was no reason to think that the relative positions had changed in favor of the barge lines; that, as testified by the Commission's cost expert, important factors contributing to the higher barge-rail costs are the relatively high cost for barge terminal operations and the added terminal handlings incurred on the joint barge-rail traffic; that Federal's president had testified before a House subcommittee as to the high terminal costs of the barge lines; and that

Valley had placed embargoes against the joint traffic to avoid a serious loss of revenue.

But more important is the fact that even if the cost evidence was stale, the validity of appellants' contentions here would in no way be affected by that fact. Suppose, for purposes of argument, that the cost evidence was stale. What right would that give the Commission to impose differentials on the all-rail routes in the absence of affirmative justification therefor? This was a general investigation on the Commission's own motion into the reasonableness and lawfulness otherwise of existing joint rates and differentials with a view to prescribing such joint rates and differentials as the facts and circumstances should appear to require. Surely an order prescribing such rates and differentials requires evidence to support it. If the evidence was stale, then the order is without a rational basis and arbitrary, and the proper procedure would have been for the Commission to assign the proceeding for further hearing to correct any deficiencies in the record which it believed to exist. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248.

It is without legal significance whether the Commission finds that the rail carriers have the advantage of lower cost of service or whether the Commission finds, as it did, that there are no demonstrable economies in the large-rail service to justify differentials. In either case, the prescription of differentials lacks a rational basis and is an arbitrary exercise of the Commission's power. Therefore, in rejecting appellants' arguments based on the national transportation policy, the Commission misconstrued the law. If, in further proceedings before it on a proper interpretation of the Interstate Commerce Act, the Commission feels that the cost evidence should be further brought up to date, it is within its power to so order.

The suggestion of the District Court and appellees that

the cost studies of appellants were deficient because based on "average costs" has no place in this proceeding. Although the cost studies of the railroads were criticized on this ground, the Commission did not pass on this criticism because it declined to make a finding as to the actual relation of barge-rail to all-rail costs during the period covered by the studies. This is a matter for determination, at least in the first instance, by the expert body, the Commission. This question was, therefore, not properly before the District Court on the findings of the Commission. To deal with this question on its merits would require a rather extended argument which would not be pertinent to the issues before this Court. It should, however, be pointed out that the barge-rail traffic involved moved over all parts of appellants' systems and was handled under all types of transportation conditions. Under such circumstances, cost studies based on system averages have been approved by the Commission. *All Rail Commodity Rates Between Calif., Oreg., and Wash.*, 277 I. C. C. 511, 529-30.

The basic issue here is simply whether the Commission can disregard relative fitness and economy and prescribe differentials based solely on the inferiority of the barge-rail service. This it has no power to do. Even if there were no difference at all in the relative operating costs between the barge-rail service and the all-rail service, the Commission would not be justified in imposing a differential on the all-rail rates for to do so clearly deprives the all-rail service of its inherent advantage of superiority of service. It was the obvious intent of Congress to protect such an inherent advantage of a carrier. If the national transportation policy does not mean that a carrier shall not have a differential to compensate for the inferiority of its service, then it means nothing. While the inferiority of the barge-rail service is a factor which the Commission

may take into consideration in fixing the measure of a differential which is justified by the economy of the barge-rail service, the mere inferiority of the service can never be justification for a differential.

This the Commission well knows. In *Rubber Products Between Southern and Ohio Points*, 41 M. C. C. 93, 98, the Commission (Division 2) said:

> "Essentially, the protestants seek an equalization of competition by the imposition of a rate differential on a competing more efficient mode of transportation. Such a request must be denied as inconsistent with the national transporation policy."

The Commission knows the law. It simply refused to follow it because of its interpretation of congressional policy with respect to water transportation. But the plain words of the national transportation policy and the decision of this Court in the *Mechling* case require the Commission to recognize and preserve the inherent advantages of all modes of transportaion, rail as well as water.

C. The Inland Waterways Crporation Act Does Not Require the Commission to Prescribe Any Differentials Which Cannot Be Justified by Relative Cos of Service or Other Transportation Circumstances and Conditns.

The Commission's relince upon section 3(c) of the Inland Waterways Corpration Act, 45 Stat. 979 [49 U. S. C. § 153(c)], as support or its belief that congressional policy requires it to prscribe differentials in favor of barge-rail service without regard to relative fitness and economy is completely unwarranted. That Act provides:

> "It is hereby declard to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall mak generally available the privi-

leges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . ."

With reference to this provision, the Commission commented, 270 I. C. C. at 610 (R. 40):

"In the light of legislative history the term 'privileges of joint rail and water transportation' must be understood as referring to barge-and-rail rates lower than all-rail rates."

There is nothing in section 3(c) of the Inland Waterways Corporation Act which can possibly be construed as the Commission has construed it, as an arbitrary direction to establish differentials in favor of barge-rail transportation. That Act discloses no intent on the part of Congress to give the water carriers an arbitrary advantage over the rail carriers, and it specifically provides that such rates shall be reasonably fair to both rail and water carriers.

This Court has held that provisions similar to this are not to be regarded as a mandate to the Commission to confer arbitrary rate advantages on the barge lines. In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, this Court had under consideration section 500 of the Transportation Act of 1920, 41 Stat. 499 [49 U. S. C. § 142], which declared it to be "the policy of Congress to promote, encourage, and develop water transportation . . . and to foster and preserve in full vigor both rail and water transportation." This Court held, with respect to such declaration of policy:

"The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably, in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the

regulatory powers of the Commission, as *e. g.*, in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all." 292 U. S. at 288.

There is nothing in the Inland Waterways Corporation Act which directs the Commission to foster the water carriers to any greater extent than did section 500 of the Transportation Act of 1920. There is nothing which requires other than "impartial recognition and promotion of the interests of all," and there is nothing which is inconsistent with the national transportation policy to recognize and preserve the inherent advantages of each mode of transportation. Even if there were, the latter would govern.

The Commission purports to be carrying out a policy to "afford to the people of a large part of the country the economies of cheaper transportation by water." 270 I. C. C. at 610 (R. 40). Yet it apparently sees no inconsistency in attempting to carry out this policy by conferring an arbitrary rate advantage on a service in which it finds no demonstrable economies which will justify differentials.

The action of the Commission may extend to the people of a large part of the country rates lower than all-rail rates, but it will not be because of the "economies of cheaper transportation by water" or because of any other advantages "inherent" in the barge-rail service. It will be because the Commission, by administrative fiat, is forcing the railroads, the rail shippers, and the general taxpayer to pay part of the transportation costs of the barge-rail service, which should rightfully be borne by the user of the service. There is nothing in the Inland Waterways Corporation Act which requires, justifies, or contemplates such a result.

D. The Commission Cannot Discharge Its Duty Under the Interstate Commerce Act Without Giving Effect to Relative Cost of Service.

"Cost-of-service evidence is essential to determine which form of transportation is economically superior or inferior," said Commissioner Eastman in his concurring opinion in *Naval Stores From Mississippi to Gulf Ports*, 235 I. C. C. 723, 738. Such a statement seems but an obvious truth, yet, in trying to avoid the result which it compels, the Commission practically repudiated all its prior decisions on this subject, and the District Court was led into a dilemma which easily demonstrates the fallacy of its reasoning.

The District Court said, 88 F. Supp. at 987 (R. 178-9):

> "So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service."

While the Court held that the Commission need not consider relative cost of service, the whole reasoning of the Court rests on the unsupported premise that joint barge-rail rates are fixed somewhere between all-rail rates and barge-rail operating costs. There is, however, no finding in the Commission's report that the barge-rail rates are fixed somewhere between the all-rail rates and the barge-rail operating costs, and, considering the substantial operating deficits incurred by Federal, 270 I. C. C. at 595-6 (R. 22), and the embargoes placed by Valley against the joint traffic, 270 I. C. C. at 606, 613 (R. 35, 44, 340), the Court did not have the slightest basis for indulging in such an unwarranted assumption. On the other hand, the lack of any such finding in the Commission's report is quite significant.

Confronted with the fact that it could find no demonstrable economies in the barge-rail service to justify differentials, the Commission attempted to avoid the force of its earlier decisions dealing with such differentials by stating, with reference to appellants' contention that there must be some economy shown in the barge-rail service to justify the differentials, 270 I. C. C. at 611 (R. 41):

> "This view is reflected in a number of our earlier reports dealing with the question of barge-rail differentials, in which we stressed lower cost of barge service as an important reason for such differentials, but in no instance did we decline to prescribe or approve differential rates because the economy thereof had not been affirmatively shown."

This statement may be technically correct, but an examination of the cases in which the Commission did prescribe differentials shows that the Commission always proceeded upon the assumption that the barge service was sufficiently cheaper than the rail service which it supplanted to justify the prescription of a differential to protect the barge-rail route.

In *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, the Commission dealt with the request of Federal for establishment of through routes and joint rates over practically the entire country. The Commission stated what it believed to be the principles which, in general, ought to guide in the establishment of through routes and joint rates. Among other things, the Commission said:

> "We are not persuaded that further rail-and-barge routes should be established where the degree of circuity would be excessive, nor where the barge line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation." 77 I. C. C. at 362.

In the same case on further hearing, in 92 I. C. C. 528, Federal sought the establishment of additional rail-barge-

rail rates on certain commodities and question was raised as to whether the Commission could prescribe less than reasonable maximum rail-barge-rail rates. The Commission stated:

> "The service rendered by the barge line in connection with the through traffic in question is not the same as the service performed by an intermediate rail carrier between the same points, being both slower and cheaper." 92 I. C. C. at 546.

The Commission concluded, therefore, that, under its power to prescribe joint rates and its power to remove discrimination between connecting lines, it could establish differential joint rates between points between which there was an existing joint all-rail rate in which a rail carrier operating between the ports of interchange participated "provided the differential fairly reflects the lower cost and value of the barge line's service." 92 I. C. C. at 547.

In *Inland Waterways Corp.* v. *Chicago G. W. R. R. Co.*, 129 I. C. C. 521, 531-2, the Commission, in dealing with a request for the establishment of additional joint rates, again referred to its statement in 92 I. C. C. at 546-7 that barge service was slower and cheaper than rail service.

In *Inland Waterways Corp.* v. *Beaumont, S. L. & W. Ry. Co.*, 142 I. C. C. 9, in dealing with a request for the establishment of additional joint routes and rates, the Commission referred to its statement in 129 I. C. C. at 531, where it quoted from 92 I. C. C. at 546-7 to the effect that the barge service was both slower and cheaper than rail service, and held:

> "It is evident that the particular traffic under consideration is such as could be economically handled by the barge line and that the differential under the all-rail rate sought by complainant is reasonable." 142 I. C. C. at 14.

It is important that the Court bear in mind that the case

at bar is not one where the Commission was merely passing on the reasonableness of a voluntarily established rate but that we are here concerned with the power of the Commission to fix a differential between two modes of transportation competing for the same traffic. Cost of service is of far greater significance in this case than in a case where the Commission is simply passing on the reasonableness of a voluntarily established rate.

The distinction is well illustrated by the decision of the Commission in *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, one of the most significant of the Commission's decisions on this subject. In dealing with a request for additional joint routes and rates, the Commission said:

> "It is evident that complainant is under some misapprehension with respect to our duty and authority in establishing new through routes. To permit carriers to maintain for competitive reasons circuitous routes and rates thereover is one thing; but to require them to do so is quite another thing . . . But here we are asked, not to refrain from interfering in what connecting carriers wish voluntarily to do for competitive reasons, but to compel an unwilling rail carrier to join in new barge-rail routes which will compete with existing all-rail routes which are amply capable of handling the business. Plainly if we are to accede to such a request, it should appear that the new routes will be reasonably economical." 151 I. C. C. at 133.

The Commission then said:

> "The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost." 151 I. C. C. at 144.

In Ex Parte No. 96, *Through Routes and Joint Rates*,

153 I. C. C. 129, the Commission devised a formula for the establishment of joint rates subject, however, to the circuity and relative-service limitations to which we have previously referred, *supra*, pp. 6-7. In discussing the proposals of the barge line, the Commission said:

> "Nevertheless, a number of very circuitous routes are included in the proposals as well as a number of instances where the barge haul is relatively so short, as compared with the total barge-rail or rail-barge-rail distance, as to raise grave doubt whether the cost of transportation is not in fact greater over such route than over the direct all-rail route." 153 I. C. C. at 133.

In *Inland Waterways Corp.* v. *Aberdeen & R. R. Co.*, 183 I. C. C. 761, complainant sought the removal of certain restrictions in the rail carriers' tariffs which limited the application of certain proportional rates to traffic moving over all-rail routes. The Commission found that the complainant was subjected to undue disadvantage and prejudice which would be removed by the establishment of joint routes and rates on the basis of the Ex Parte 96 formula. The Commission noted, however:

> "The railroads of the country, considered as in effect parts of one great system of transportation, are in direct competition for traffic with water lines including the Federal barge line. As such competitors, it appears to us that it would be unfair to force them to divert from their rails traffic originated by them to competitive water lines, except in those instances where it can be shown that the services to be performed can be more economically rendered by the water lines than by the rail lines, or where there is some other justification other than a mere desire upon the part of the water lines to divert traffic from the rails for the sole purpose of increasing their tonnage and securing the revenue accruing therefrom." 183 I. C. C. at 765.

Appellees' arguments that costs are only one factor to be considered in passing on the reasonableness of a rate are, therefore, not pertinent here where the Commission was not passing on the reasonableness of a voluntarily established rate. Nor can this case be determined on the basis of rate comparisons and similar data such as are often relied upon by the Commission in passing upon the reasonableness of rates of a single carrier or group of carriers of the same kind. Here, where the Commission is fixing a differential between competing modes of transportation, the determination of relative fitness and economy is essential. For such a determination cost-of-service evidence is necessary.

Throughout the whole history of these differentials, the Commission has been careful to point out that they rested on the assumed lower cost of service of the barge lines. As late as 1945, Federal itself insisted "that the prime reason for differential rates is not the disability of the service by water but the lesser cost of operation by water than by rail . . ." *Inland Waterways Corp.* v. *Southern Ry. Co.*, 263 I. C. C. 227, 234.

Thus it can be seen that while the Commission may never have declined to prescribe differentials because the economy of the barge-rail service had not been affirmatively shown, the Commission was always careful to point out that the differentials rested on the assumed lower costs of the barge-rail service. Since the Commission had evidence of relative cost of service before it in this case, it can no longer indulge in such an unwarranted assumption, but it must, to discharge properly its duty under the Act, give effect to the evidence before it.

III.

The Commission Cannot Establish Joint Barge-Rail Rates Without Finding That Such Rates Will Be Just and Reasonable.

The Commission did not find that the joint barge-rail rates which it prescribed would be just and reasonable rates. Such a finding is indispensable to the validity of the Commission's order. Without such a finding, the order lacks a rational basis. While section 307(d) of the Act does not specifically provide that the rates which the Commission may establish are to be reasonable, this power of the Commission must be exercised in accordance with the other rate-making provisions of the Act and the provisions of the national transportation policy "to encourage the establishment and maintenance of reasonable charges for transportation services, without . . . unfair or destructive competitive practices." Section 1 (4) of the Act specifically requires the joint barge-rail rates to be just and reasonable. Appellants have a right to expect that their competion will be on the basis of just and reasonable rates. Competition on any other basis is an unfair and destructive competitive practice.

The Commission made no attempt to test the reasonableness of the rates by recognized transportation standards. It did not find that the rates which it established would cover cost of operation plus a reasonable profit. In view of Federal's substantial operating deficits and the embargoes placed against this traffic by Valley, appellants submit that, based upon standards usually employed by the Commission for determining the reasonableness of rates, the Commission could not have found that the joint barge-rail rates which it prescribed would be just and reasonable.

Nor is there any merit to the barge lines' suggestion that to fix reasonable differentials is to fix reasonable rates and that the two cannot be legally distinguished. To deduct from existing all-rail rates differentials determined solely on the basis of the lower value of the barge-rail service furnishes no reason at all for assuming that the resulting barge-rail rates will return cost plus a reasonable profit.

Before the Commission is permitted to require the railroads to participate in joint barge-rail rates lower than the corresponding all-rail rates, the Commission should be required to find that the rates which it prescribes will be just and reasonable.

IV.

No Justification for Differentials Can Be Found in the Fact That the Barge Lines Must Necessarily Bear the Burden of Such Differentials.

In its report, the Commission said, 270 I. C. C. at 612 (R. 44):

> ". . . the respondent barge lines reiterate their concurrence in the principle that railroads which are parties to joint barge-and-rail rates are entitled to revenues therefrom equivalent to what they would receive from corresponding all-rail rates. Accordingly, since the barge lines accept the burden of the differential without imposing it in whole or in part on the railroads, they urge that their views as to the measure of the differential are entitled to important weight, as we observed in our first report on this subject, previously quoted, 77 I. C. C. 317, 362."

This argument of the barge lines, however, completely misses the point in controversy. Divisions of the joint rates are not here involved. The rail lines are quite willing to accept the same revenue from a barge-line connection as from a rail-line connection. The railroads ask for no

more revenue on traffic which moves beyond their lines by barge than they ask on traffic which moves beyond by rail, which is another important factual difference between this case and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. It is not the rail lines with which the barge lines connect, but those with which they are competitive, which are here complaining. The question here is whether a barge-rail route as a whole shall have an unjustified rate advantage over an all-rail route and thereby divert traffic not from the rail carrier with which the barge line connects, but from the rail carrier with which it competes, although in certain instances, the rail carrier with which the barge line competes may be the same carrier with which it connects.

A simple illustration will make this clear. The Illinois Central Railroad is the short single-line rail route from Centralia, Ill., to New Orleans, La. In addition to moving all the way from Centralia to New Orleans via the Illinois Central, a shipment can also move from Centralia to Cairo, Ill., via Illinois Central and thence by Federal to New Orleans; or it can move to Cairo by Illinois Central and thence via the Gulf, Mobile and Ohio Railroad to New Orleans. For its service from Centralia to Cairo, the Illinois Central is perfectly willing to accept the same division of the through rate from Federal as it accepts from the Gulf, Mobile and Ohio. The complaint of the railroads is that differentials which are not justified by the economy of the barge-rail service impose an unfair and unlawful penalty on the rail haul of the Illinois Central and Gulf, Mobile and Ohio from Cairo to New Orleans and divert traffic from the rail carrier to the barge carrier for that part of the journey. It is the rail haul which is in competition with the barge carrier between Cairo and New Orleans, not the rail haul from Centralia to Cairo, which is hurt by unjustified differentials.

The Commission could not compel the Illinois Central to apply a lower through rate over its joint route with the Gulf, Mobile and Ohio from Centralia to New Orleans than it would permit the Illinois Central to apply over its direct route even though the Gulf, Mobile and Ohio were willing to bear the burden of the differential by accepting a smaller division of the rate. Why, therefore, should the Commission be permitted to compel the Illinois Central to apply a lower through rate in connection with Federal than it will permit the Illinois Central to apply over its direct route unless there is some economy in the barge-rail route to justify diverting the traffic from the Illinois Central by such a differential? And, assuming that the Illinois Central operated only between Centralia and Cairo, why should Federal have an arbitrary rate advantage over the Gulf, Mobile and Ohio? Such an advantage, unless justified by transportation circumstances and conditions, would force the Illinois Central to discriminate between its connections in violation of section 3(4) of the Interstate Commerce Act.

Furthermore, the prior statement of the Commission in *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, 362, to the effect that since the barge line bears the burden of the differential, it may be given considerable latitude in fixing its amount, had a far different meaning in the context in which it was made from that attributed to it by the Commission's report in this proceeding.

In the *U. S. War Department* case, Federal had asked the Commission to establish a large number of joint barge-rail routes. The Commission found that the evidence would not permit it to undertake such a task; instead, it confined itself to indicating its "conclusions as to the general principles which ought to guide in determining what further through routes and joint rates, if any, ought to be established." 77 I. C. C. at 362.

The general principles there enunciated by the Commission made it quite clear that the Commission did not expect any joint barge-rail route to be established where the cost via that route was not less than the cost via the all-rail route. When the cost was less, then the barge line, since it had to bear the burden of the differential, might be given considerable latitude in fixing its amount. In other words, where the differential was justified by the lower cost of service of the barge-rail route, then the barge line's views as to the measure of the differential were entitled to important weight. But there is not the slightest hint in that case that differentials were to be justified merely because the barge line had to bear them.

The mere fact that the Commission, in the *War Department* case, said that it was not persuaded that further rail-barge routes should be established "where the degree of circuity would be excessive, nor where the barge line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation" completely disposes of the notion that differentials can be justified simply by the fact that the burden of the differentials must be borne by the barge lines.

In view of the importance attached to this argument by the barge lines and the completely erroneous significance attributed to the Commission's statement in the *U. S. War Department* case when lifted out of context, we quote a portion of the general principles stated by the Commission in its report in that proceeding, 77 I. C. C. at 362:

> "1. We are left in doubt by the record as to whether further rail-barge-and-rail routes are in the public interest. It may be that they are desirable in certain cases, but we feel that the barge line has not sustained the burden of proof in this respect.
>
> "2. We are not persuaded that further rail-and-barge routes should be established where the degree of circuity would be excessive, nor where the barge

line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation . . .

"3. The record leads to the conclusion that there are additional rail-and-barge routes which would not be open to the objections mentioned above and which ought to be established. It further indicates, however, that if such additional routes are established it will probably be necessary for the barge-line management to modify in some respects its plan of differential joint rates. So long as the barge line bears the burden of the differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount; and under the principles which we have outlined for the fixing of divisions, the burden of the differential would, in our opinion, be borne by the barge line. . . ."

As the Commission itself said, principle 3 applies only in the case of routes which would not be open to the objections stated in principle 2. The principle that, since the barge line bears the burden of the differential, it may be given considerable latitude in fixing the amount, therefore, applies only in connection with routes which can themselves be justified by lower cost of service. So interpreted, the principle is perfectly valid. Within the limits within which the differentials are justified by economy of the barge-rail service it is proper to give considerable weight to the views of the barge lines as to the measure of the differential under which they wish to operate. But it was never intended that the willingness of the barge lines to bear the burden of the differentials would, in itself, be justification for such differentials. If that were true, there could never be any reason for denying the establishment of any differentials the barge lines desired.

The Commission must obviously have recognized the fallacy of such reasoning, for it remarked, 270 I. C. C. at 612-13 (R. 44):

> "The requirement that the barge line absorb the differential in its division of the joint rate in and of itself provides some measure of safeguard against the performance of uneconomical barge-and-rail service where the barge line is privately operated, as shown by Valley's recent embargoes of joint traffic interchanged with the railroads."

The Commission, however, well knows that it is Federal against whom appellants need protection. The fact that Federal bears the burden of the differential has been no safeguard at all against the performance of uneconomical barge-rail service since Federal's losses are borne by the taxpayers. This is the very reason why the Commission should not prescribe differentials without economic justification for them and why in the past the Commission has always adopted general principles or formulas to confine the differentials to routes over which it was assumed they would be justified.

Since they must bear the burden of the differentials, the barge lines' views as to their measure are, of course, proper factors to be taken into consideration in fixing the amount of differentials which are justified by lower costs of service, but acceptance of the burden of the differentials can never in and of itself be regarded as justification for them.

V.

The Commission's Order Lacks the Requisite Rational Basis and Is Unsupported by Essential Findings of Fact and Substantial Evidence.

When the Commission abandons transportation circumstances and conditions as its guide for determining the reasonableness and lawfulness of rates and attempts to adjust rates with regard to considerations extraneous to the transportation standards of the Interstate Commerce

Act, the result is necessarily an arbitrary exercise of the Commission's power.

Commissioner Miller, the author of the Commission's report, in a separate statement on his own behalf frankly stated, 270 I. C. C. at 620 (R. 53):

> "The differentials approved by this report are, in the final analysis, based largely on judgment and are necessarily more or less arbitrary."

But why should the differentials approved by the report be "more or less arbitrary"? And why should they be any more "based largely on judgment" than any of the other rates which come before the Commission for determination of their lawfulness?

The Commission has recognized transportation standards provided by the Interstate Commerce Act for determining whether rates and differentials are lawful. It has section 1(4), which provides that the joint barge-rail rates shall be just and reasonable. It has sections 2 and 3(1), which provide that there shall be no discrimination or undue preference and prejudice in rates. It has section 15a (2), which provides a number of factors which the Commission shall take into consideration in the exercise of its power to prescribe just and reasonable rates. Yet, the Commission apparently considered none of these and did not even purport to test the lawfulness of the rates involved under any of these sections of the Act.

It has already been pointed out that the findings of the Commission disclose no legal theory upon which the differentials can be justified. Appellees, therefore, attempt to obscure the lack of any legal basis for the Commission's order by falling back on the usual defense of expertise and administrative finality. But expertise is supposed to be a rational process, and the Commission is under the legal obligation of making clear the process of its reasoning.

It is now too well settled to permit of argument that an order of an administrative agency must be supported by findings of the basic or essential facts which represent the determination of the agency as to the meaning of the evidence and which serve as the basis for findings of ultimate facts or conclusions. *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 211-12. *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80, 94-5. *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488-9. *Morgan* v. *United States*, 298 U. S. 468, 480. *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-2. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504-5, 506, 510-11. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 463, 464. *Florida* v. *United States*, 282 U. S. 194, 215. *Saginaw Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 554, 559, 560, 561 (C. A. D. C.), certiorari denied 305 U. S. 613. *Tri-State Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 564, 566 (C. A. D. D.). *Baltimore & O. R. Co.* v. *United States*, 22 F. Supp. 533, 536-7 (N. D. N. Y.).

This is not a mere technical requirement. It is an essential part of the administrative process. Proper findings are necessary to enable a reviewing court to determine whether the Commission decided the case in accordance with the evidence and the applicable law. The findings need not be in formal style, but they must make clear "with a fair degree of assurance, why the Commission acts as it does." *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 212. It is essential that the findings include "the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred." *Saginaw Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 554, 560.

The Commission cannot pick ultimate findings out of the air. They must naturally flow from findings of the basic facts. As was said in *Tri-State Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 564, 567, there must be

> "... some rational or coherent relationship between the basic facts and the ultimate facts, that the latter shall flow logically from the former. It was not the will of Congress as expressed in the statute that orders should be based upon ultimate facts which bear no rational relationship to the basic facts shown by the evidence."

Here there are no findings of the basic facts from which the Commission's ultimate finding that differentials are justified can be rationally inferred. Certainly the Commission's conclusion that differentials are justified cannot be rationally inferred from its finding that it could find no demonstrable economies in the barge-rail service which would justify differentials

The District Court could see nothing wrong in the Commission's findings, saying, 88 F. Supp. at 989 (R. 182):

> "... the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seem to us to comprise the 'quasi-jurisdictional' findings which the Supreme Court has declared essential."

Such a holding is clearly not in accord with the decisions of this Court. The proper rule was stated by the Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506, as follows:

> "The statement ... that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated."

Here, too, the Commission's conclusion that the differentials are justified and reasonable is not supported by facts more particularly stated.

The decisions of this Court with respect to what findings are necessary to support an order of an administrative

agency were reviewed in an excellent opinion in *Baltimore & O. R. Co.* v. *United States,* 22 F. Supp. 533, 536-7, by Judge Learned Hand, who said, in speaking for a District Court of three judges:

> "We do not think that the bare finding can be made to do so much duty. The purpose of findings in such cases is to enable the courts to discharge their proper function, which is to make sure that the Commission in the discharge of its highly specialized and technical duties, has followed the statute. We have no competence to review their conclusions upon questions of rate making, so far as they involve matters peculiar to transportation; it is to the last degree desirable that we should not concern ourselves with them, as the Supreme Court has said again and again; and we cannot so confine ourselves, when the findings are equivocal. It is true that a finding in the ordinary case that a rate is reasonable may conceal interpretations of law which it will be hard to detect, but there must be some compromise as to the statement of details. That does not excuse the absence here of some statement as to the other constitutive facts necessary before a 'reasonable' rate can be disregarded and a lower one substituted. . . . The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. The defendant says that in *Florida* v. *United States,* 292 U. S. 1, 54 S. Ct. 603, 78 L. Ed. 1077, the Commission's very jurisdiction to regulate intrastate rates hinged upon a finding that they directly affected interstate rates; and that here no jurisdictional facts are at issue. 'Jurisdiction' is a treacherous word; we are not clear that the Commission's jurisdiction is not involved; but in any event in *United States* v. *Baltimore & Ohio R. R.,* 293 U. S. 454, 464, 55 S. Ct. 268, 272, 79 L. Ed. 587, it was expanded to 'quasi-jurisdictional,' which was meant to cover all 'indispensable' facts; and in *United States* v. *Chicago, Milwaukee, St. Paul & P. R. Co.,* 294 U. S. 499, 504, 55 S. Ct. 462, 464, 79 L. Ed. 1023, the phrase 'basic or quasi-jurisdictional facts' was substituted,

as in *Morgan* v. *United States*, 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. What findings are 'basic' is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside."

As Judge Hand so well points out, what findings are basic is a practical matter, but certainly there should be such findings as will enable the Court to ascertain on what legal theory the Commission proceeded. If the Commission proceeded in this case on any legal theory other than that differentials were required by congressional policy, its findings fail to disclose such a fact.

The ruling of the District Court that the Commission need only state its conclusion in the language of the statute is merely the same argument in another form (discussed *supra*, pp. 28-30) that the power conferred on the Commission by section 307(d) is purely discretionary. But section 307(d), as has been shown, confers no such power. Congress has provided that the Commission may act only after full hearing, and that implies that the Commission will receive evidence and decide the case in accordance with the evidence. *Chicago Junction Case*, 264 U. S. 258, 264-5.

Nor can it be said that there must be some evidence in a record of more than 16,000 pages and nearly 1500 exhibits which will support the order. When the Commission specifically excludes any demonstrable economies in the barge-rail service as justification for the differentials and fails to point to any evidence which it does regard as justification for the differentials, the order is clearly not supported by substantial evidence.

It necessarily follows that the Commission's order is not supported by essential findings or substantial evi-

dence, and that there is no rational basis for the order. The Commission clearly did not act in accordance with the pertinent provisions of the Interstate Commerce Act but acted under a misconstruction and misinterpretation of the law and of its own statutory power. It has exceeded its authority, and its action is arbitrary, unlawful, and void.

CONCLUSION.

The judgment of the District Court should be reversed and the cause remanded to that Court with directions to set aside the order of the Interstate Commerce Commission and remand the case to that Commission for further proceedings in conformity with the opinion of this Court.

Respectfully submitted,

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APPENDIX A.

Interstate Commerce Act, As Amended:

NATIONAL TRANSPORTATION POLICY.

[54 Stat. 899; preceding 49 U. S. C. § 1.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

SEC. 1(1) [41 Stat. 474; 49 Stat. 543; 49 U. S. C. § 1(1).] That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; . . .

* * * * *

Sec. 1(4) [54 Stat. 900; 49 U. S. C. § 1(4).] It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

* * * * *

Sec. 1(5)(a) [41 Stat. 475; 48 Stat. 1102; 54 Stat. 900; 49 U. S. C. § 1(5)(a).] All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Sec. 3(1) [54 Stat. 902; 49 U. S. C. § 3(1).] It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular de-

scription of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * *

Sec. 3(4) [54 Stat. 903; 49 U. S. C. § 3(4).] All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic, between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

* * * * * *

Sec. 15(1) [41 Stat. 484; 48 Stat. 1102; 49 Stat. 543; 54 Stat. 911; 49 U. S. C. § 15 (1).] That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions

of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum or maximum and minimum to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

Sec. 15a(2) [54 Stat. 912; 49 U. S. C. § 15a(2).] In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

* * * * *

Sec. 307(d) [54 Stat. 937; 49 U. S. C. § 907(d).] The Commission may and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions

of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. . . .

* * * * *

Sec. 320(e) [54 Stat. 950; 49 U. S. C. § 920(e).] Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended (U. S. C., title 49, sec. 153(e)), is hereby repealed as of October 1, 1940; *Provided, however,* That (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of such subsection (e) shall continue in effect as though issued under the provisions of section 309 of the Interstate Commerce Act, as amended; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of such subsection (e) shall, after the repeal of such subsection (e), be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended.

* * * * *

Inland Waterways Corporation Act, As Amended:

Sec. 3(c) [45 Stat. 979; 49 U. S. C. § 153(c).] It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . .

* * * * *

Sec. 3(e) [45 Stat. 980.] [Repealed, effective October 1, 1940, by sec. 320(e) of the Interstate Commerce Act.] Any person, firm, or corporation, includ-

ing the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates

ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible. . . .

* * * * *

APPENDIX B.

Excerpts from congressional debates on S. 2009 (Transportation Act of 1940), referred to herein, *supra*, p. 34:

In the Senate.

"[MR. WHEELER.] All we seek to do by the pending bill is to regulate all forms of transportation in exactly the same way—water carriers, railroads, and busses and trucks.

. . . . . .

We have taken a billion and a half dollars out of the Treasury of the United States to be used to widen and deepen those river channels. Who has paid the taxes to provide that money? All the people of the United States, including the railroads of the country, have paid those taxes. They have helped to pay for the widening and deepening of those channels with their own money. In view of the fact that the Government furnishes the water carriers with the means to carry on their transportation, they should at least submit to having their rates regulated upon a fair basis with their competitors. I challenge anyone to say that that is not fair and just.

. . . . . .

". . . . but the Congress of the United States has announced its policy; and all we are seeking to do by this proposed legislation is to say that the competitors in the various fields of transportation, particularly water carriers, inasmuch as we take millions of dollars out of the Treasury every year to improve the waterways so that the water carriers may operate upon them and the railroads pay a part of that cost, ought to be regulated in the same manner and under the same circumstances as the other forms of competing transportation are regulated." 84 Cong. Rec. 5870-2, 5873.

• • • • • •

"MR. AUSTIN. So, if there is one type of common carrier which has a natural facility or a natural advantage over another, the bill does not require, indeed, I understand it not to permit, the extinguishment of the natural advantage in competition for the benefit of the competitor which has not the advantage. Am I correct in that interpretation?

"MR. WHEELER. The senator is entirely correct, and I thank him for his statement. In the rate-making provision, and in three different places in the bill, we wrote in such a provision specifically so as to protect them." 84 Cong. Rec. 5883.

* * * * *

"[MR. WHEELER.] No one has gone into the abuses of the railroads and fought the abuses of the railroads to the extent the Committee on Interstate Commerce has done. We have investigated them and shown them up as has not been done in years by the Congress of the United States; but I would not be fair to myself and I would not be fair to the general public if I did not say that, notwithstanding the abuses that have been going on, the railroads are entitled to a square deal; they are entitled to have their competitors regulated not so as to enable them to raise their rates to give them business, but so that their competitors may not put into effect out-of-pocket rates—rates upon which they lose money simply for the purpose of breaking down the railroad rates." 84 Cong. Rec. 5949.

* * * * *

"MR. TRUMAN. . . . The railroads are absolutely essential to the welfare of the country, and they should not be discriminated against any more than any other method of transportation should be discriminated against. The object of the pending bill is to try to put all methods of transportation on an equal basis. If it will not do that we shall have failed in our effort." 84 Cong. Rec. 5958.

* * * * *

"[MR. NORRIS.] . . . The water carriers certainly have no moral right, as I see the matter, to say to

the railroads, 'You must be regulated, but we must not be regulated'; in other words, giving them an opportunity to do just what the railroads did a few years ago. It would be just as bad if the water carriers people did it as though the railroads did it." 84 Cong. Rec. 5966.

* * * * *

"[MR. WHEELER.] I say to the Senator, as I said a moment ago, that when this legislation is enacted it will be found to be beneficial, because we are stating that it is the policy of the Congress of the United States that the Interstate Commerce Commission shall treat each and every one of these forms of transportation upon an equal basis; and no language could be written into law that more clearly directs that that should be done than we have done in the Interstate Commerce Committee." 84 Cong. Rec. 6073.

* * * * *

"[MR. WHEELER.] When the bill speaks of inherent advantages of the shipping interests, it refers to carriers which can transport at a cheaper rate because they can ship by water, by way of canals and the ocean, so they have natural advantages, and they do not have the expense of the upkeep of the rights-of-way, as the railroads do.

. . . . .

"The bill seeks to give equality to the railroads in the same respect in which we give equality to everybody else.

. . . . .

"When I say 'the same basis' I do not mean to apply the same rates but recognizing the inherent advantages of water transportation, the inherent advantages of bus and truck transportation, and the inherent advantages of railroad transportation. If we desire a unified transportation system, that is what we have got to do; and if we do not want such a transportation system, then let us repeal the law providing for the regulation of railroads, and turn them free." 84 Cong. Rec. 6127, 6135, 6149.

In the House of Representatives.

"[MR. LEA.] Now, what is the situation about this subsidization? What is the transportation problem of the United States? How are we going to avoid Government ownership? Government ownership is just a form of subsidization. It does not help solve our problem. It lifts the burden from one place and places it more firmly upon the backs of the taxpayers of the United States. Do we not all recognize it is very difficult for a private industry to compete with a Government-financed industry that has no capital account to contend with? That is what we have in this present situation. I am not complaining about that, but I do say that these transportation agencies by water, that have been so helped by the Federal Government, ought not come here and object to submitting to that form of regulation, just and fair, that the Federal Government gives to the other transportation agencies of the country with which they compete." 84 Cong. Rec. 9705.

* * * * *

"MR. HALLECK. The object of this legislation is to coordinate and stabilize fundamentally all of the transportation systems of this country and to put them on a fair and equal basis and to preserve the inherent advantages of every type of transportation. You cannot read anything else in it in any line or at any place. This is a matter of equity and of fairness." 84 Cong. Rec. 9712.

* * * * *

"[MR. MARTIN.] I know that the very able and competent chairman of the Committee on Interstate Commerce, the subcommittee, and the committee as a whole have labored to preserve each agency of transportation embraced in the bill in the field best adapted to its particular mode of transportation and to deal fairly with each of them, to the end that each may make its proper contribution to the transportation needs of the country, and on a basis of 'live and let

live.' I believe this legislation is a more than fair beginning toward that end." 84 Cong. Rec. 9719.

• • • • •

"[MR. PEARSON.] This bill is so drawn that even a casual reading will show that there is no purpose or intention to adjust rates in such manner as to deprive any carrier of the inherent advantage of its cheaper carrying costs. A coordination of rates must of necessity take into consideration and regard the advantage of one type of transportation over another, and this bill in its declaration of policy, made a part of the basic act, states that the purpose is 'to provide for fair and impartial regulations of all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each.'" 84 Cong. Rec. 9730.

• • • • •

"[MR. VAN ZANDT.] That is so clear that he who runs may not only read but also may comprehend. It is the sound principle of 'equal rights for all and special privileges for none' strictly applied to our transportation system by water, highway, and rail, as well as other means. There can be no two ways to interpret this explicit policy. There can be no escape from it by any special pleading on the part of the water lines. They must yield to the logic of the statement and to the force of its application.

. . . . .

"Certainly none of the agencies can be granted special favors in any square deal for transportation, and the main object of this bill is to place all common carriers on an equality in matters of regulation. That equality is what the railroads need most to enable them to continue to give the American public the best transportation service ever furnished at the lowest true cost." 84 Cong. Rec. 9746, 9748.

• • • • •

"[MR. CROSSER.] Nor must it be assumed, for a single moment, that regulating the different kinds of transportation agencies requires the fixing of the

same rates for each of the transportation agencies. Applying the same principles to the different kinds of transportation agencies in the matter of rate-making might, and very likely would result in entirely different rates from the standpoint of dollars and cents. That being true, we will find each agency of transportation carrying the particular traffic to which it might be naturally adapted. This is as it should be in any comprehensive system of regulation." 84 Cong. Rec. 9775.

* * * * * *

"[MR. WOLVERTON.] There has been no desire on the part of the conferees to advance one method of transportation above another. On the contrary, we have constantly sought to insure to each type of transportation the preservation of the inherent advantages of each. The objective in all our deliberations has been to provide a system that in principal and detail would operate in the public interest.

* * * * * *

"It is only fair that the portion now remaining unregulated—inland waterways—should also be brought under regulations, thus providing a complete and unified national system of transportation without favor to one mode of transportation above another but preserving to each the inherent advantages of each." 86 Cong. Rec. 5878, 5881.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 45*

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLANTS IN NO. 45.

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* Together with No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*, No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al.*, and No. 48, *Savannah Sugar Refining Corporation, Appellant* v. *United States, et al.*, also on appeals from the same Court.

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I.

The Interpretation Placed on the Order by the United States and the Interstate Commerce Commission Is at Variance With the Terms of the Order.

The United States and the Commission undoubtedly realize that the Commission had no legal basis for prescribing differentials in this case, for they now put forth

* Together with No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*, No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al.*, and No. 48, *Savannah Sugar Refining Corporation, Appellant* v. *United States, et al.*, also on appeals from the same Court.

the curious argument that all the Commission was doing was establishing rates based on differentials but that appellants are not required to maintain the differentials. Appellees' contention is inconsistent with the meaning commonly ascribed to the term "differentials" utilized by Congress in section 307 (d) of the act. No purpose would have been served by utilization of the term "differentials" if the railroads were to be left free to eliminate them. If the appellees are correct in their contention, the Commission, in prescribing differentials, has performed an utterly futile act.

The brief states (p. 24):

> "Moreover, the differentials prescribed by the Commission are *fixed, i.e.*, any changes made in the all-rail rates would not automatically change the rail-barge rates. Although this order is based upon the present level of rail rates, it does not require the rail carriers to maintain that level."

And, again, on page 35, it is stated:

> "* * * the order has no direct operation on all-rail rates, and therefore does not prevent the railroads from protecting their competitive position by seeking to lower such rates * * *."

Of course, the order does not require appellants to maintain the present level of all-rail rates, but appellants interpret the order as requiring the maintenance of differentials. The order (R. 15) requires the carriers

> "* * * to establish * * * and thereafter to maintain and apply to the transportation of property over the through routes referred to in the next preceding paragraph the joint rates prescribed in the said reports based upon the differentials found in the said reports to be justified."

This is a very important point, and there should be no doubt left as to the meaning of the order. Appellants do

not believe that counsel for the United States and the Commission have the right to bind the Commission to an interpretation of the order such as is here urged, which seems so at variance with the plain terms of the order. If the Commission interprets the order as not requiring the maintenance of the differentials but as permitting the appellants to meet the barge-rail rates, that fact should be made known to the Court by the Commission either formally or informally, but on the specific authority of the Commission.

If the interpretation suggested by counsel for the United States and the Commission is correct, certain portions of our argument relating to differentials are inapplicable. There would still remain, however, the extremely important point whether the joint rates are just and reasonable. The Commission did not so find.

II.

The Commission's Findings Do Not Support Appellees' Contention That the Order Was Not Based on Congressional Policy But Was Based Upon the Applicable Statutory Standards.

The appellees do not seriously question appellants' contention that an order of the Commission cannot be based on congressional policy, nor do they deny that the policy of Congress is to accord to all modes of transportation fair and impartial regulation so administered as to recognize and preserve the inherent advantages of each. Instead, they defend the order on the ground that it was not based on congressional policy. This argument must fall because there are no findings in the Commission's report to indicate any basis for the order except the supposed policy of Congress.

This is a basic issue which can be decided by the Court only after an inspection of the Commission's report. Appellants submit that such an inspection will show that the contention that the order is based on congressional policy is not a strained and unnatural construction of the report, as the barge-line appellees allege (Br., p. 23), but is merely a recognition of what the Commission itself said was the basis for its order. There are no findings in the report to indicate that the Commission was attempting to determine the reasonableness and lawfulness of the joint rates and differentials according to the transportation standards of the Interstate Commerce Act. Repeated assertions of appellees that the order was based on applicable statutory standards do not, of course, take the place of the missing findings.

Appellants do not ask that the Commission make formal findings of fact, that it specify the weight given to any item of evidence or disclose the mental operations by which its decision was reached. All appellants ask is that the Commission make clear that it was acting in accordance with the proper legal theory and that it had a rational basis in fact for its order.

This Court has never regarded the language of section 14(1) of the act, relied on by the barge-line appellees (Br., p. 39), as relieving the Commission of the necessity of making such findings of the basic facts as will show that the Commission was not acting arbitrarily but that it had a rational basis for its order.

Throughout the brief of the United States and the Commission, reference is made to the "statutory standards" as if only Part III of the Interstate Commerce Act were involved. But this court made it quite clear in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574-577, that section 307(d) of the act was subject to the specific limiting standards of other applicable sections of

the Interstate Commerce Act. It is plain from the decision of this court that the provisions of Part I of the act are to be considered along with those of Part III of the act. Furthermore, by section 1(1) of the act, the joint rates are subject to the provisions of Part I of the act. Under sections 1(4) and 1(5)(a), they are required to be just and reasonable. They must not be unduly preferential or prejudicial under section 3(1). Under section 15a(2) the Commission is required to take into consideration various factors in the exercise of its power to prescribe just and reasonable rates. The brief does not discuss these "statutory standards."

The United States and the Commission rely (Br., p. 29) on the provisions of Part III of the act to establish the thesis that Congress did not intend that "voluntary rates of water carriers should be tested for validity against corresponding rail rates." No one here contends that they should. This case does not involve the voluntary rates of the water carriers. It involves prescribed joint barge-rail rates and prescribed differentials between those rates and the all-rail rates.

To say that, when the Commission fixes differentials between competing carriers, it shall consider the effect on only one of them does not make sense. Section 15a(2) of the act says that, when the Commission prescribes rates, it shall consider, among other factors, "the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed." The prescription of differentials between carriers fixes a relationship between the carriers and defines the terms upon which they may compete, just as effectively as if the rates had been specifically prescribed for each of them. No warrant in law or reason can be found for saying that the Commission should give no consideration to the effect of the differentials on the traffic of the rail carriers.

The discussion of the "statutory standards" in the brief of the United States and the Commission arrives at the conclusion that the Commission must "preserve the ability of water carriers to charge low rates," for which *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, is cited as authority. If the ability of the water carriers to charge low rates does not depend on their operating cost, upon what does it depend?

That was made very clear by this Court in the *Mechling* case when it said:

> "Although barge lines were much slower than railroads, they were less expensive to operate and therefore could afford to transport freight much more cheaply than railroads." 330 U. S. at 570.

The issue is thus very simple. If, with respect to this particular traffic, the barge-rail routes are "less expensive to operate" and can afford to transport traffic "much more cheaply than railroads," they are entitled to differentials. If they are not, they are not entitled to differentials simply because their service is inferior.

III.

The Argument of the United States and the Commission Is Based Upon an Assumption That the Joint Barge-Rail Rates Are Compensatory and Reasonable, Which Is Not Supported by the Commission's Findings.

The entire argument of the United States and the Commission is based upon the assumption that the joint barge-rail rates are compensatory and reasonable and that appellants, to protect all-rail traffic, are trying to force the joint rates above a reasonable level. Examples of this

philosophy are shown below.* This argument, which is a flagrant misstatement of appellants' contentions, is based upon an assumption of fact which cannot be supported by the Commission's findings.

The brief states (p. 42):

> "The Commission established the joint rate schedule on the premise that if the barge lines perform the service involved in the barge leg of the proposed rail-barge routes at rates based upon the prescribed differentials, the compensation received will cover their costs and yield a return on investment."

---

* "And there is no basis in law for the contention that barge rates must be kept artificially high to protect railroads from competition." (p. 19)

"The railroad-appellants seek to establish the principle that, as a matter of law, they are entitled to protection, under the guise of preservation of 'inherent advantages,' from the legitimate competition of barge lines." (p. 25)

"Appellants, in attacking those differentials, are seeking to have water rates established which are higher than the 'lowest cost' to the public consistent with the furnishing of efficient water service." (p. 29)

'The Commission rightly refused to interpret its duty to maintain the 'inherent advantages' of rail carriers as an obligation to maintain barge rates at an artificially high level and thus, by relieving the railroads of effective competition, to bring rail-barge traffic to an end." (p. 33)

"The right of a mode of transportation to have its 'inherent advantages' preserved is not a right to be free from reasonable rate competition from other modes of transportation. If barge rates are set at compensatory levels, as they have been here, the remedy for the railroads in order to meet such competition would appear to be to improve their service or lower their rates, or both—and not, as appears to be the case here, to seek to compel their competitors to raise *their* rates." (p. 43)

"The Commission has in effect followed the rule that if an inferior service believes it can profitably operate at rates lower than those charged for the superior service, the inferior service should be permitted the opportunity to do so." (p. 44)

"With this contention we agree, but we disagree with the contention that to preserve the inherent advantages of the low-cost carriers—whether rail or water—the Commission is required to compel competing carriers to maintain artificially high rates." (pp. 45-6)

One of the issues in the proceeding before the Commission was the reasonableness of the prescribed joint rates (R. 79-80). It is axiomatic that when a question is raised as to whether a rate is below a reasonable level, the Commission must first find that the assailed rate is reasonably compensatory before the rate under attack can be approved. One of the great purposes of the Interstate Commerce Act was to prevent destructive competition and this concept is carried into the national transportation policy. The cases are legion where rates proposed by carriers have been condemned because they were found to be non-compensatory and the Commission must observe the same standard when it prescribes rates. "Obviously, what the carrier may not lawfully do, the Commission may not compel." *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 637. Appellants here claim that the failure of the Commission to find that the prescribed rates would be just and reasonable vitiates the order. Appellees have no right to state as a fact that the Commission established the rates on the premise that the compensation received by the barge lines will cover their costs and yield a return on investment. The Commission made no such finding.

The brief also states (pp. 28-9):

> "The differentials here prescribed were carefully designed to produce a return to the barge lines sufficient to cover costs, and a return on investment. As previously stated (pp. 15-16), the differentials fixed by the Commission were substantially as proposed by the barge lines, and have not been challenged by them at any stage of this proceeding."

This statement is misleading for appellees are well aware of the fact that Valley contends the joint rates are "confiscatory" as to it in a proceeding currently before the Commission in Docket 30118, *New Orleans Traffic and Transportation Bureau* v. *Mississippi Valley Barge Line*

Company, a complaint filed by one of the other appellees attacking the validity of Valley's embargoes in this traffic.*

The dilemma in which Valley finds itself is referred to in guarded language in footnote 6 of the barge-line appellees' brief (pp. 8-9), where the following statement is made:

> "In the Commission's report dated July 7, 1948, (R. 35) and in the brief filed by appellant in No. 47 in opposition to the motion to affirm reference is made to an embargo declared by Mississippi Valley Barge Line Company against the handling of merchandise traffic in less-than-bargeload quantities. It is true that due to rising costs of labor, material and supplies since the decisions of the Commission in July, 1948, the Mississippi Valley Barge Line Company found it impossible to operate except at a substantial loss and that in order to abate such losses it declared said embargo in October, 1948. If and when the Mississippi Valley Barge Line Company is called upon under the contested order to reestablish service on basis of the prescribed differentials it may find it necessary to petition the Commission for modification of the differential plan or for a temporary stay of the effectiveness of its order. In the present posture of the proceeding it is important only to remember that

---

* No decision has been rendered by the Commission in the case. It was orally argued before the Commission (Division 3) October 19, 1950, at which time the following statement was made by Mr. Harry C. Ames, counsel for Valley, at page 601 of the record in that proceeding:

"Now, they talk about 26712. We fought that case from 1934 to date—sixteen years; and next month we will be over in the Supreme Court, helping the Commission to defend its order.

"As a matter of principle, we say the Commission had the power to enter that order, on the evidence.

"But if the Supreme Court sustains that order, we are going to have to come to you and ask you to modify or cancel out its effectiveness as applied to us, because we will still be operating at confiscatory rates, and we do not think that you, or anybody else, can make us do that—to be perfectly frank with you."

neither of those circumstances has the slightest bearing upon the questions of law which the reviewing court must decide."

The briefs of appellees attempt to leave the inference that the rates have become confiscatory since the decision of the Commission in 1948. Appellants have no doubt that, since 1948, the relative positions of the all-rail and the barge-rail routes have been further substantially altered to the disadvantage of the barge-rail routes, a fact which, as appellees say, is of no concern in this proceeding. But appellants again call the attention of the Court to the fact that, on the argument of this proceeding before the Commission on March 10, 1948, counsel for Valley informed the Commission that Valley was incurring heavy losses on this merchandise traffic and that, to stop such losses, Valley embargoed a substantial portion of the traffic (R. 340-1). In its report, the Commission referred to the embargoes which had been laid by Valley (R. 35-6, 44). The Commission also referred to the testimony of the president of the Federal Barge Lines, before a subcommittee of the House of Representatives, in April, 1947, in which he called attention to the high costs of terminal handling and stated that, under such conditions as existed in 1946, package freight could not be handled at a profit (R. 34). Federal's president also said that the private lines had also encountered the problem of rising terminal costs and did not want most types of merchandise freight because of the high cost of handling it under present terminal methods (R. 35).

It is submitted that the Commission did not believe and could not have believed, when it issued its order, that the joint rates were compensatory and reasonable by the usual transportation standards. Its order was obviously based on other grounds. Appellees' argument only emphasizes how important it is that the Commission be required to

make the necessary findings. Without the vital finding showing the reasonableness of the rates, this order cannot be upheld.

IV.

No Legal Basis Is Shown for the Fixing of Differentials in This Case.

The first requisite for the validity of this order, a finding that the rates will be just and reasonable, is missing here, as has been shown. But if appellants' interpretation of the order as one requiring the maintenance of differentials between all-rail and barge-rail rates is correct, something more is also required. There must be some legal basis to justify the Commission's preventing the appellants from meeting the rates of their competitors. Even if the barge-rail rates were just and reasonable, the Commission could not establish differentials between them and all-rail rates unless it were shown that the all-rail rates were minimum reasonable rates or that some specific violation of the Interstate Commerce Act would result if the all-rail rates were reduced to meet competition. The Commission has no power to allocate traffic on an arbitrary basis.

Appellees do not make any real attempt to deal with this question. The whole argument of the United States and the Commission is on the assumption that the order does not require the maintenance of differentials. They also impute to appellants arguments which appellants have not made.

The brief for the United States and the Commission states (p. 38):

> "Baldly stated, the relative costs argument is that rates for an inferior service must equal rates for a superior service unless the transportation costs of the

> inferior service are lower. In other words, a service is to be priced in total disregard of its value to the consumer; and the consumer must pay just as much for an inferior as for a superior service, simply because there is no showing that it costs less to furnish the inferior service."

That is not appellants' contention and never has been. Appellants do not contend that rates for an inferior service must necessarily equal rates for a superior service unless transportation costs of the inferior service are lower. We do not contend that a service is to be priced in total disregard of its value to the consumer. We do not contend that the consumer must pay just as much for an inferior service as for a superior service simply because there is no showing that it costs less to furnish the inferior service. Furthermore, we do not contend that costs are the sole determinative factor in rate-making, that either the all-rail or barge-rail rates must be based entirely on costs or that the differentials must accurately reflect costs.

Appellants contend that the Commission has no power to prevent a superior service from meeting the rates of an inferior service if it wishes to do so, unless the inferior service can be provided at a lower cost.

Assuming that he can do so at just and reasonable rates, it is perfectly proper for the operator of an inferior service to sell that service for less if he is willing to accept less than the operator of a superior service, even though his service may not be less expensive to furnish. What appellants contend is that the Commission has no power to establish a differential between the rates of the two services to prevent the superior service from meeting its competition unless the inferior service can be furnished at lower cost. There is a vast difference between what carriers may do voluntarily and what the Commission may compel them to do.

Appellants have no objection to the consideration of value of service and all other proper factors in the determination of the measure of such differentials as are justified by economy of service. When no such economy is present, however, the fixing of differentials between competing modes of transportation solely on the basis of the value of their respective services is not only wrong in principle but is a mockery of the national transportation policy. The whole philosophy of the national transportation policy is by fair and impartial regulation to encourage, rather than penalize, economy and efficiency of operation.

As noted in our brief, pp. 37-38, 44-49, the Commission, in prescribing barge-rail rates differentially lower than all-rail rates, has always proceeded on the assumption that barge-rail costs are lower than all-rail costs. That assumption has been assailed in this case. The legislative history of the Transportation Act of 1940 clearly shows that Congress was interested in preserving, for the benefit of shippers, such rates of the water carriers as were justified by the lower costs of the water carriers. Only after a finding based on substantial evidence that barge-rail costs are lower than all-rail costs is it proper to take into consideration such other factors as are necessary to induce the movement of traffic by the slower, inferior barge-rail service. Cf. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. Only where the Commission finds that barge-rail costs justify barge-rail rates lower than all-rail rates found to be minimum reasonable rates may the Commission prevent the rail lines from meeting the barge-rail competition. But that is not this case.

The barge-line appellees say (Br., p. 37) that the terms "reasonable" and "justified" in section 307(d) of the act mean the same there as they do in other sections of the act. That is exactly our contention. In *Petroleum*

and Petroleum Products, Calif. to Ariz., 241 I. C. C. 21, 42, for example, the Commission said:

> "The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petroleum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity carried are of less importance."

There is every reason to believe that the Commission would have considered costs of the same significance in this case had it felt that it was not under the compulsion of congressional policy to give the barge lines an arbitrary rate advantage.

It is not essential to the maintenance of appellants' contentions that there be an affirmative finding of lower all-rail costs as compared to barge-rail costs. From a legal standpoint, the finding that there are no demonstrable economies in barge-rail service to justify the differentials is the equivalent of such a finding.

The basic fallacy of appellees' contention is an assumption that the Commission has a purely discretionary power and that the burden is on appellants to show that anything the Commission might pick out of the air is unreasonable, but there is no such burden on appellants. It is well established that, when the Commission exercises a power such as is conferred by section 307(d), its findings must affirmatively indicate that there is a rational basis in fact for its order. Certainly, a finding that there are no demonstrable economies in the barge-rail service

cannot in any way be viewed as a rational basis for the prescription of differentials.

Furthermore, the fact that the Commission said that to find that appellants had the inherent advantage of lower cost of service would be "tantamount to the abrogation of the express policy of Congress" (R. 42) is in itself an error of law sufficient to vitiate the order.*

V.

Willingness of the Barge Lines to Bear the Burden of the Differentials Does Not Constitute Justification for Them.

Appellees continue to suggest that the barge lines are willing to bear the burden of the differential and do not seek to impose it on the rail lines, as if this in some way constituted justification for the differentials. This is another variation on the value of service theme, which, as has already been shown, in and of itself does not constitute justification for the establishment of differentials.

The willingness of one carrier to accept less for its

* The statement in the brief for the United States and the Commission (p. 13) that "the Commission rejected the cost studies" of appellants is, of course, wholly erroneous. The Commission declined to make a finding as to relative all-rail and barge-rail costs in the period 1933-38 but did not reject the cost studies.

The statement (brief, p. 32) that the "Commission carefully preserved to the connecting rail carriers the division received by them for the corresponding portion of all-rail service" is likewise without support in the Commission's findings. The point is relatively unimportant because appellants are willing to have the case decided on the assumption that the rail carriers will receive the equivalent of all-rail divisions, but appellants cannot let such a statement pass unchallenged. The proposals of the barge lines were based on this theory and contained what the Commission referred to as a "requirement that the barge line absorb the differential." (R. 44.) This case, however, did not involve divisions, and there is nothing in the Commission's findings to show that the Commission designed the rates to give the rail carriers substantially the same division as they receive from corresponding all-rail routes. A similar statement appears on page 40 of the brief.

service than another carrier is willing to accept for a more desirable sevice may justify the establishment by the former of a lower rate provided it is just and reasonable. It cannot, however, under the national transportation policy justify taking from a more efficient carrier with a superior service the right to meet the rates of the inferior service if it desires to do so. The fallacies of this argument were fully explored in appellants' brief, pages 51-56.

In a footnote on page 43 of the brief for the United States and the Commission, it is said:

> "As an abstract proposition, it might seem anomalous for a carrier to complain of a competitor's willingness to accept a lower rate which does not compensate the latter for its operating costs."

Such a situation is neither abstract nor anomalous. It is the concrete situation with which appellants are confronted in this case.

VI.

Appellants, as Parties Subject to the Order and as Competitors of the Barge Lines, Have the Legal Interest Necessary to Entitle Them to Challenge the Order.

The barge-line appellees, in their brief in this Court, raise for the first time the question whether appellants have the right to seek judicial review of the order. Their argument in this respect is based upon a misconception of appellants' position and upon several cases, none of which is authority for their contention here. In fact, the cases cited do not bear sufficient resemblance to the case now before the Court to make worth-while a discussion of those cases. None of the cases cited is authority for the proposition that parties subject to an order may be denied judicial review of the order. None of them is authority for the proposition that carriers having a direct and vital

interest in the transportation situation which the order of the Commission affects may be denied judicial review of the unlawful order.

On the contrary, it is well established that appellants are entitled to judicial review of this order because they are parties to it and because they have a direct interest in the transportation situation affected by the order. *Chicago Junction Case*, 264 U. S. 258; *Alton R. Co.* v. *United States*, 315 U. S. 15. See also *Stark* v. *Wickard*, 321 U. S. 288; *Columbia System* v. *United States*, 316 U. S. 407; *Youngstown Co.* v. *United States*, 295 U. S. 476; *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47.

It would be strange indeed if parties subject to an order could not challenge its valiidty. The barge-line appellees say that appellants do not complain as parties to the order (Br. 22) but this is incorrect. Appellants complain very strenuously as parties subject to this order. Appellees seem to forget that, as competitors of the barge lines, appellants are prevented by the order from meeting their competition.

Consider the illustration shown in footnote 10 on page 27 of the barge-line appellees' brief. In the particular illustration shown, the Wabash does not complain nor does the Illinois Central or Gulf, Mobile & Ohio complain, "as a connection forced into a joint arrangement with the barge lines against its desire to have *only* railroad connections." They do complain, however, as connections forced into a joint arrangement with barge lines while they are required to maintain higher all-rail rates between New Orleans and Chicago not only over their own rails direct but over their joint all-rail routes with each other and with other rail carriers.*

* Traffic moving direct over the Illinois Central between New Orleans and Chicago would not move through St. Louis. See, for example, the illustration shown in appellants' brief, p. 52. The principle, however, is the same.

Both the Illinois Central and the Gulf, Mobile & Ohio may handle traffic direct over their own rails from New Orleans to Chicago. The Illinois Central may also handle traffic from New Orleans to St. Louis, and there deliver it to the Gulf, Mobile & Ohio to be moved to Chicago. Likewise, the Gulf, Mobile and Ohio may handle traffic from New Orleans to St. Louis, and there deliver it to the Illinois Central for movement to Chicago. Appellees also neglect to mention that the Missouri Pacific operates between St. Louis and New Orleans although it does not reach Chicago. Yet, the Missouri Pacific, along with the other rail carriers, is required to maintain over its route in connection with the Illinois Central, Gulf, Mobile & Ohio, and Wabash joint all-rail rates higher than those in effect over the barge-rail routes. It is, thus, in every respect a party subject to this order. It cannot be reasonably contended that in such circumstances these carriers do not have a sufficient standing to challege the validity of the order. Such a rule would bar review of practically all Interstate Commerce Commission orders.

The interest of appellants is not remote and speculative but direct and substantial. Appellants "clearly have a stake as carriers in the transportation situation which the order of the Commission affected," *Alton R. Co.* v. *United States*, 315 U. S. 15, 19, and they clearly are entitled to maintain their claim to equality of treatment with their competitors.

In the *Chicago Junction Case*, 264 U. S. 258, 266-8, this Court said:

> "If, as suggested in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here.
>
> "This loss is not the incident of more effective

competition. Compare *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are under the Interstate Commerce Act, as fully entitled as any shipper. * * *

"The plaintiffs may challenge the order because they are parties to it. The Judicial Code, § 212 (originally the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 542) declares that any party to a proceeding before the Commission may, as of right, become a party to 'any suit wherein is involved the validity of such order.' The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order."

There can be no question but what appellants have the necessary legal interest to entitle them to challenge the validity of the Commission's order.

Conclusion.

For the reasons stated in appellants' brief and this reply brief, the judgment of the District Court should be reversed and the cause remanded to that Court with directions to set aside the order of the Interstate Commerce Commission and remand the cause to that Commission for further proceedings in conformity with the opinion of this Court.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949 1950

No. [redacted] 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU,

Appellants,

vs. [redacted]

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT OF GALVESTON CHAMBER OF COMMERCE, ET AL. AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON DIRECT APPEAL.

Galveston Chamber of Commerce and Houston Port and Traffic Bureau, intervening complainants in the above captioned case, having this day presented their petition for direct appeal therein, now file this their statement of the basis upon which they contend that the Supreme Court of the United States has jurisdiction to review the final decree and should exercise such jurisdiction. This is done in conformity with Rule 12 of the Supreme Court of the United States.

Jurisdictional Statutory Provisions and Court Decisions Thereunder

The decree in question was entered by a statutory three judge court specially convoked under and by virtue of the

provisions of the Judicial Code, 28 U. S. C. § 1336, 1398, 2284, and 2321-2325, inclusive.

The Supreme Court has jurisdiction to review the decree by direct appeal under the Judicial Code, 28 U. S. C. § 1253 and 2101 (b). These provisions represent a consolidation and continuance of the substance of statutory provisions previously in effect, under which appeals were taken in many cases such as the following. *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567; *New York* v. *United States*, 331 U. S. 284; and *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573.

Statutes Involved in the Merits of the Case

The case involves:

The Interstate Commerce Act, which opens with a declaration of national transportation policy to be followed in the administration of the act. Among other things, it calls for fair and impartial regulation of all modes of transportation subject to the act, to recognize and preserve the inherent advantages of each and to avoid unjust discriminations, undue preferences and unfair or destructive competitive practices.

Section 1(1)(a) of the same act, 49 U. S. C. 1(1)(a), which provides that it applies to traffic moving partly by water and partly by rail as well as to all-rail traffic.

Section 1(5)(a), of the same act, 49 U. S. C. 1(5)(a), which provides that all charges for transportation must be just and reasonable.

Section 3(1), of the same act, 49 U. S. C. 3(1), which prohibits undue preference of shippers, localities, ports, etc.

Sections 13(1), of the same act, 49 U. S. C. 13(1), 13(2) thereof, 49 U. S. C. 13(2); 14(1) thereof, 49 U. S. C. 14(1); and 15(1) thereof, 49 U. S. C. 15(1), which provide the procedure and machinery for investigations, hearings, etc., and for requiring the establishment and maintenance of rates found reasonable as maximum and/or minimum, non-preferential and otherwise lawful by the Interstate Commerce Commission.

Section 307(d), of the same act, 49 U. S. C. 907(d), which gives the Commission power to require through routes and reasonable joint rates partly by rail and partly by water, differentially lower than all-rail rates where justification is found.

Section 320(e) of the same act, which repealed Section 3(e) of the Inland Waterways Corporation Act, as amended by the so-called Denison Act, 45 Stat. 980, but continues in force rates prescribed prior to October 1, 1940, under the Inland Waterways Corporation Act.

Also involved is the Constitution, Article 1, Section 9, Clause 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

The Nature of the Case and the Rulings of the District Court

The case arose out of an order of the Interstate Commerce Commission in its Docket No. 26712, which was an investigation of existing rates for the through transportation of freight partly by rail and partly by barge from and to various points in the greater Mississippi Valley, these rates being differentially lower than the all-rail rates from and to the same points. The main issue was as to whether these rates or possibly others to be prescribed would be reasonable and otherwise lawful for the future. For the most part

the existing rates were those established over a period of years in purported conformity with orders of the Commission entered, without hearings, in various proceedings under Section 3(e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980. In said Docket No. 26712, entitled *Rail and Barge Joint Rates*, the Commission issued an original report, 270 I. C. C. 591, dated July 7, 1948, and a supplemental report, 274 I. C. C. 229, dated June 13, 1949. Therein it prescribed a new system of differentials to be deducted from all-rail rates to make barge-rail rates in most of the territory involved and entered an order June 13, 1949, requiring that they be put into effect on or before November 1, 1949.

The Commission, in prescribing and ordering the rates in No. 26712, acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. § 907 (d), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

The railroads contended that the Commission construed this provision as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The record showed that the costs to the carriers were at least as great via rail-barge as via all-rail. The Commission said in its original report that it could not find that there were demonstrable economies in

the rail-barge service which would justify differentials and it appeared that the prescription of differentials rests solely upon the supposed Congressional mandate. The railroads felt that the Commission's construction of the law was in error and in violation of the National Transportation Policy stated in an introductory paragraph of the Interstate Commerce Act, and that the differentials were not "justified" by the evidence. On September 20, 1949, they accordingly instituted this court action, alleging that the Commission's decision was arbitrary, capricious, unconstitutional and otherwise unlawful. Due to the pendency of this proceeding, the Commission postponed the effective date of its order from time to time. It now stands postponed until May 31, 1950. Galveston Chamber of Commerce, Houston Port and Traffic Bureau and the sovereign State of Texas, through the Railroad Commission of Texas, intervened, supporting the railroads and asking similar relief, particularly with respect to rates between New Orleans, La., and interior points west of the Mississippi River. Galveston and Houston are ports of entry and egress for water-borne traffic (export, import, coastwise and intercoastal) handled in competition with New Orleans, which traffic originates at, or is destined to, interior points west of the Mississippi River. The rail-barge rates which the Commission prescribed between New Orleans and the interior points, in arbitrary disregard of its statement that it could not find demonstrable economies in the rail-barge service, would artificially afford competitive advantages for New Orleans' interests, while depriving Houston and Galveston interests of their inherent advantages of location and subjecting them to grave injustice and serious injury. This would be unlawful. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

The intervening complainants above mentioned urged that the Commission was arbitrary in prescribing differential

barge-rail rates for New Orleans, resulting in undue preference of New Orleans and undue prejudice to Galveston and Houston interests, in violation of Section 3(1) of the Interstate Commerce Act, 49 U. S. C. § 3(1); and that such rates would bear an unreasonable relation to the rates between Galveston and Houston, on the one hand, and the interior points on the other, and be below reasonable minima, in violation of Section 1(5)(a) of that Act; also the Commission failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for rail-barge rates. They contended that the Commission's reports and its order lacked findings and conclusions essential to their constitutional and statutory validity, citing cases such as the following: *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504, 510; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488; *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 211.

The intervening complainants urged that Finding 2 of the Commission was arbitrary because the proviso at the end of the finding proceeds to determine barge-rail rates between New Orleans and the interior west by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure. They contended that the cost of the through barge-rail haul with relation to the cost of the all-rail haul should be determinative.

The intervening complainants urged that Finding 1 of the Commission was arbitrary, because it contains on proper proviso for testing certain rates, although the necessity for such is recognized by Finding 2.

Article 1, Section 9, Clause 6, of the Constitution provides that no preference shall be given by any regulation of com-

merce or revenue to the ports of one State over those of another. The intervening complainants accordingly urged that if it is correct to construe section 307(d) of the Interstate Commerce Act as a mandate for differential rates, regardless of transportation conditions, that provision of law is unconstitutional because it then means that States having ports served by inland waterways to and from the interior shall be given an artificial advantage over States not having ports served by such waterways. It is understood that the provision of the constitution mentioned embraces any description of legislation looking to a direct privilege or preference of the ports of one State over those of another. See *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421.

By prescribing rates not justified by the relative costs, the Commission would violate the National Transportation Policy declared on the opening pages of the Interstate Commerce Act. These rates would be a burden on the economy of the nation and would unlawfully divert traffic from the railroads to the barge-rail routes. The barge-rail carriers with their higher operating costs would have lower rates than the all-rail lines at the expense of shippers and the public.

The intervening complainants prayed that, upon final hearing of the cause, the Court adjudge that the order of the Interstate Commerce Commission to have been predicated upon an unconstitutional statutory provision, or a misconstruction of the Interstate Commerce Act, unlawful, beyond the power of the Commission, arbitrary, capricious, without rational basis, unsupported by essential findings, and contrary to and without support in the evidence; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation, and execution of said order as to the rates from

and to New Orleans, and that interveners have such further relief as might be deemed proper by the Court. They asked that the Commission's case be remanded to the Commission for action respecting the existing rates not inconsistent with the Court's decision.

The Court, specifically deciding some very important points against the intervening complainants, dismissed the case. It is sincerely felt that the Court was wrong in doing so.

Copies of the court's opinion and Findings of Fact and Conclusions of Law appear as Appendices Nos. 1 and 2 hereto.[1]

Questions of Great Substance and Importance Are Involved

Many new questions of law are presented by this case. The question of whether the Commission misconstrued the differential provision of Section 307(d) of the Interstate Commerce Act will no doubt affect the barge-rail rate structure for years to come. It is a matter of prime importance, because if barge-rail routes are required to perform wasteful transportation, the public as well as shippers not in position to use such routes will have to foot the bill. It is a matter of prime importance not only to the railroads which would have to give up much of the traffic and revenue to competing forms of transportation, but to Galveston and Houston interests who compete with New Orleans for the heavy traffic from and to the interior points west of the Mississippi River.

---

[1] (Clerk's Note.—The Opinion of the District Court is printed as an appendix to the Statement as to Jurisdiction in the case of *The Alabama Great Southern Railroad Co., et al.* v. *United States, et al.*, No. 748, and is not reprinted here.)

For New Orleans to have an advantage over Galveston and Houston regardless of transportation conditions is a very serious matter.

Whether the inferior service of the barge-rail routes is justification for differentials, regardless of the relative cost of service, is a question of far-reaching effect.

The question whether the Commission may test barge-rail rates from and to New Orleans by considering only the rail portion of the through haul is presented. If the Commission correctly construed the differential provision of Section 307(d) as a mandate for differentials regardless of transportation conditions, a grave question of constitutionality affecting Galveston, Houston and the rights of the sovereign State of Texas is involved.

The case is plainly one which affects the national transportation economy, as well as rights of individual shippers, localities and ports. The questions involved are substantial and important.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~250~~ 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees*.

No. ~~250~~ 47

RAILROAD COMMISSION OF TEXAS, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees*.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF ABOVE NAMED APPELLANTS OPPOSING MOTIONS TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees.*

No.

RAILROAD COMMISSION OF TEXAS, *Appellant,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees.*

Appeal from United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF ABOVE NAMED APPELLANTS OPPOSING MOTIONS TO AFFIRM

OPENING STATEMENT.

The Texas interests above named who file this brief were intervening plaintiffs or complainants in a case before the United States District Court for the Northern District of

Illinois, Eastern Division, brought by various railroads, Civil Action No. 49 C 1434, *The Alabama Great Southern Railroad Company et al.* v. *United States of America et al.*, in which all the original and intervening plaintiffs have filed appeals.

The brief is a reply to motions to affirm filed by certain appellees, namely: Interstate Commerce Commission; American Barge Line Company; Inland Waterways Corporation, operating the Federal Barge Line; and Mississippi Valley Barge Line Company. The Texas interests have not been served with a motion by the appellee United States of America, and understand that no such motion has been filed.

A motion to affirm seems to be appropriate in a one-sided case, but if there is any one-sidedness in this case, the one-sidedness certainly does not lie on the appellees' side.

The appellees say that no new or substantial questions are presented by this case. We think it will be plain from the briefs filed in opposition to the motions that new and important questions are involved and that the District Court has gravely erred in its decision.

May it be understood at the outset that the Texas interests concur in and support what is said in the railroad appellants' brief opposing the motions to affirm. What is herein said is supplemental thereto and bears particularly upon the legal wrong suffered by the Texas interests as a result of the Commission's order and the District Court's failure to set aside and enjoin that order.

STATUTES AND PROVISIONS OF CONSTITUTION INVOLVED.

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C., and the Constitution are set out in the Appendix to this brief.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION.

The rates prescribed by the Interstate Commerce Commission in its Docket No. 26712,[1] which brought on this proceeding, are for rather general application to the through transportation of package or merchandise freight partly by rail and partly by barge principally in the territory between the Rocky and Appalachian Mountains. They are differentially lower than the all-rail rates between the same points. They include rates between New Orleans, La., and interior points west of the Mississippi River, with which this brief particularly deals; for example, rates on imported Brazilian coffee moving from New Orleans up the Mississippi River to Memphis, Tenn., and thence by rail inland to Wichita, Kans. The effective date of the order requiring the establishment of the rates prescribed in No. 26712 has been postponed because of this court proceeding.

The Texas interests who file this brief are vitally concerned with the barge-rail rates between New Orleans and the interior territory west of the Mississippi River because Galveston and Houston as ocean ports are in keen competition with New Orleans for export, import, coastwise and intercoastal traffic coming from and going to that interior territory. The record in the case before the Commission showed that the Galveston and Houston interests would suffer great detriment if the prescribed rates between New Orleans and the interior West should become effective while the all-rail rates between Galveston and Houston and that territory remain relatively higher. (Tr. 9466-9626; Exhibits 1032-1035) The questions presented by the case are vital to the welfare of Galveston and Hous-

[1] *Rail and Barge Joint Rates*, 270 I. C. C. 591; 274 I. C. C. 229.

ton. Moreover, they are of great public importance, as they affect the national transportation economy.

The rates prescribed by the Commission in No. 26712 were to generally replace a system of similar differential barge-rail rates that had grown up over a period of about 25 years principally in conformity with orders of the Commission in cases under the so-called Denison Act, which purported to give the Commission authority to prescribe such rates without a hearing, at a time when it was commonly believed and understood that barge-rail transportation, like barge transportation, could be performed at much lower cost than all-rail transportation. The case before the Commission arose out of demands by railroads for a hearing on this subject. The statutory authority relied upon for the prescription of the rates in that case is section 307(d) of the Interstsate Commerce Act, 49 U. S. C. 907(d), which provides that the Commission may after hearing prescribe such differentials for barge-rail rates as it may find to be "*justified*", which of course means justified by the evidence.

The record in No. 26712 contains a large amount of evidence regarding what it cost all-rail routes as compared with competing barge-rail routes to transport freight. This evidence, consisting of oral testimony and exhibits, was offered by witnesses on both sides. It was referred by the Commission to members of a commission employee staff of cost-finding experts, who analyzed it and at one of the hearings presented a summary thereof, adequately supported by detailed data, explanations and reasons. The general conclusion of the experts, quoted just below the middle of page 604 of the Commission's original report, is to the effect that barge-rail costs exceed all-rail costs, due largely to the relatively high cost of barge terminal operations and the cost of handling the freight between barges and railroads at the river-landing transfer points. And just below the

middle of page 606, the Commission makes the following statement:

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrier, which from the standpoint of cost of service would justify differentials.

Notwithstanding this definite, basic and unqualified finding of fact, the Commission prescribed and ordered a system of differentials which would be deducted from all-rail rates to replace most of the existing barge-rail rates.

THE DECISION OF THE DISTRICT COURT.

Before the District Court, the Texas interests joined the railroad plaintiffs in saying that the Commission prescribed differential barge-rail rates without finding demonstrable economies in barge-rail transportation and thus showed that it obviously looked upon the differential provision of section 307(d) of the Interstate Commerce Act as a mandate to prescribe differential rates regardless of costs and other transportation circumstanes and conditions. The appellees point out in their motions that the District Court interpreted the Commission's above-quoted statement regarding relative costs practically as a finding that there were no usable cost data in the record. The District Court and the appellees give to the above quoted statement a meaning wholly unjustified. They would dismiss costs from consideration and base the differentials primarily, if not altogether, on the fact that barge-rail service is inferior to all-rail service.

The strained and peculiar meaning which the District Court and the appellees attribute to the Commission's conclusion regarding relative costs, and the emphasis placed thereon by the appellees in their motion to affirm, bring

into bold relief the following paragraphs on page 606 of the Commission's original report:

> In his testimony before the subcommittee mentioned above, Federal's president stated that "many large operators, private, contract, and common carriers have better, more efficient fleets and provide faster and more dependable service than the Federal barge lines." He pointed out, however, that the private lines have also encountered the problem of rising terminal costs and *do not want* most types of merchandise freight because of the high cost of handling it under present terminal methods.
>
> This development is illustrated by the experience of Valley,[2] whose increasing proportion of bulk freight since 1941 has previously been mentioned. In that year it interchanged more than 325,000 tons of freight with railroads, but in 1947 its joint traffic was only 37,000 tons. This decline of 89 percent apparently was due in large part to embargoes placed against rail-barge traffic by Valley *in order to avoid a serious loss of revenue* owing to the expense of transferring freight between barges and railroad cars. Although it still has some hope of profitable participation in this joint traffic at a future time, the outlook is obscure. (Emphasis supplied)

The appellees' repeated assertions that the cost data are stale and the inference left that they are entitled to differential barge-rail rates is completely negatived by these paragraphs.

ARGUMENT.

National Transportation Policy declared in the opening paragraph of the Interstate Commerce Act contemplates an appraisal of the inherent advantages of all-rail and barge-rail services, respectively, and the cost of performing the respective services is in the nature of things the basic and most important feature to be considered. The

[2] Means Mississippi Valley Barge Line Company.

value of the respective services may also be considered, but not to the exclusion of the basic and major element of relative cost. Any dismissal of costs as a major element means a violation of the fundamental purpose of the national transportation policy.

Although the Commission and the barge lines, when before the District Court, in terms condemned the cost data as stale and otherwise undependable, the efficiently operated private barge lines in real life by their acts and deeds recognize that the cost data correctly portray the actual situation. They know the traffic is unprofitable and for that reason they embargo it. It is not embargoed because of congestion or physical disabilities. According to the above quoted paragraphs, the rates prescribed by the Commission are below the cost of the service. The rates on the traffic here involved are therefore an unlawful burden on other traffic. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585. The District Court did not overlook the facts in the two above quoted paragraphs, but fell into fatal error in not giving effect to what they plainly proved. Incidentally, it may be noted that the lawfulness of the embargoes is before the Commission in Dockets No. 30118, *New Orleans Traffic and Transportation Bureau* v. *Mississippi Valley Barge Line Company,* and No. 30123, *New Orleans Traffic and Transportation Bureau* v. *American Barge Line Company.* The embargoes naturally suggest a question, viz: Why does not the Federal Barge Line embargo this traffic like the two other lines? The Federal Barge Line is subsidized. It operates at a loss, and generally has done so since it was organized over 30 years ago. The public pays the bill. Many months ago the Federal Barge Line asked Congress for 18 million dollars of public funds for new equipment. If an appropriation is ever made the barge line may hope to do business at lower cost, but judging by its past there is every reason to believe that it could not do even as well as the efficiently operated private barge lines, which find the traffic unprofitable. In the

light of these disclosures, the fact that the barge-rail service is inferior does not save the situation for appellees. It is clear that the Commission should have found, if it did not, that there are no economies in barge-rail service. No one can fairly say that inferior service justifies differential barge-rail rates when the traffic does not pay expenses. Thus the Commission was absolutely arbitrary in requiring differential barge-rail rates. This is not a case in which one form of transportation is voluntarily making rates to meet a competing parallel form by the maintenance of compensatory rates, but one in which the power of the Government is sought to be used unlawfully to compel one form of transportation which has a natural cost-of-service advantage to give up traffic and revenue to a high-cost competing form. Plainly the barge-rail rates are violative of the declared national transportation policy.

In *Petroleum and Petroleum Products, Calif., to Ariz.*, 241 I. C. C. 21, the Commission was investigating the rates of two competing forms of parallel transportation, viz.: railroads and motor carriers. At page 41 of its report, it referred to the National Transportation Policy as then expressed in the Interstate Commerce Act and the Motor Carrier Act, which, particularly so far as the present case is concerned, was not materially different in principle from that now stated in the opening paragraph of the Interstate Commerce Act with respect to all regulated forms of transportation. The Commission then went on and said:

> The corresponding rule of rate making for motor-carrier rates is contained in section 216 (i) of the Motor-carrier act. The two rules are practically identical except that the motor-carrier rule contains the added direction that consideration shall be given "to the inherent advantages of transportation by such carriers." This additional provision was included to make certain that the motor carriers would be regulated with a view to the conditions inherent in the motor-transportation industry

without regard to the interest of any other mode of transportation. In fairness, we should give consideration to the inherent advantages of transportation by rail when rates by rail carriers are before us, particularly in a proceeding where competing rates of motor carriers are also under review. The two rules for rate making, together with section 202 (a), indicate the policy of Congress to be that in the regulation of these transportation agencies we should recognize and preserve in the interest of the public the inherent advantages of each. The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petroleum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity carried are of less importance.

Particular attention is called to the last three complete sentences. It is respectfully urged that in considering the rates of competing forms of transportation, cost is a dominant element and should not be wholly disregarded as the appellees seem to contend it may be. It was the duty of the Commission to consider relative costs in this case. Cost is too important an element to be cast aside. If the Commission felt that the cost data was for any reason unusable, it was its duty to further investigate and get satisfactory data, because under the differential provision of section 307 (d) it has the burden of finding justification before it prescribes differentials. It is here interesting to note that about ten years ago, after the Commission got rather complete jurisdiction over motor and water transportation, as it already had over rail transportation, it set up and developed in its organization

a well-equipped cost-finding staff. In other words, the Commission was fully conscious of the fact that, in order to properly regulate competing forms of transportation, data as relative costs were necessary. It was members of its cost-finding staff who testified, as above stated, in No. 26712 before the Commission that barge-rail costs exceed all-rail costs.

Under Reorganization Plan No. II, 53 Stat. 1434, the Secretary of Commerce has operated the Federal Barge Line since July 1, 1939. His printed report to the President of the United States, dated December 1, 1949, entitled "Issues Involved in a Unified and Coordinated Federal Program For Transportation," contains the following language beginning new the bottom of page 45:

> "* * * the Government should consider continuing its various promotional programs along lines which call for payment by the user for the various facilities. Government regulatory agencies should simultaneously consider the elimination of rates which are not closely related to the fully distributed cost of rendering the service. If action along both lines were to proceed at the same time, most of the legitimate complaints which the railroads have against their competing carriers would be eliminated and most of the legitimate complaints which water and motor carriers have against the rail carriers would be disposed of. The net result would be a more effective use of transport resources with each type of carrier performing the various services in which it had a cost advantage. This, after all, is the basic objective of the Transportation Act of 1940, and action of the sort just described appears necessary in order that the objective of the 1940 act may be realized."

We cannot reconcile these sound statements of the governing head of the Federal Barge Line with the position taken by that line's officials in this case.

A relatively few shippers, such as those at New Orleans, get part of their freight charges on shipments via the Fed-

eral Barge Line and rail connections paid out of the United States Treasury. Shippers at Galveston and Houston ship by rail to and from the interior West and pay their own freight charges in full. By the Commissioner's decision, unduly favorable treatment and artificial advantages are arbitrarily accorded New Orleans interests to the detriment of the Texas interests. This is obviously a violation of Section 3 (1) of the Interstate Commerce Act by the very tribunal that is charged with preventing undue preferences and prejudices.

The Texas interests urged before the District Court that the prescribed barge-rail rates preferred the State of Louisiana over the State of Texas, in violation of Article 1, Section 9, Clause 6, of the Constitution, which was enacted for the purpose of protecting the individual States from discrimination by Congress. In *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, the Supreme Court said that the above-mentioned provision of the Constitution might embrace any description of legislation looking to a direct privilege or preference of the ports of one State over those of another. The contention of the Texas interests was that if the Commission was correct in construing the differential provision of section 307 (d) of the Interstate Commerce Act as a mandate to give New Orleans and other ports served by inland waterways differential barge-rail rates regardless of cost and other transportation circumstances and conditions, it was arbitrary and unconstitutional because it meant that States having such ports would be given an artificial advantage over States not having such ports. It was further contended by the Texas interests that the only way to regard the differential provision as constitutional was to hold that it is not a mandate and that differentials must be "*justified*" by proved transportation conditions.

In the second paragraph on page 16 of the barge lines' motion to affirm is a statement that as to the alleged viola-

tion of the ports preference clause of the constitution, the District Court's holding is fully supported by *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131. About all that can be said for that decision is that it *related* to a ports preference allegation. It contains nothing that is even helpful in considering the constitutional question presented in the instant case.

In the first paragraph on page 15 of the barge lines' motion is seen a highly erroneous statement that the Texas interests are dissatisfied with the Commission's order because it provides for New Orleans the advantages of its location on the Mississippi River. As clearly indicated upon brief and oral argument before the Court, the fact is that the Texas interests complained that the advantages enjoyed by New Orleans are due to the arbitrary action of the Commission in prescribing differential barge-rail rates from and to that point without facts of record to justify them. The interior territory west of the Mississippi River, from a geographical standpoint, is naturally tributary to Galveston and Houston. New Orleans, as compared with Galveston and Houston, is unfortunately situated with respect to that territory, but the Commission's order undertook to afford New Orleans artificial competitive advantages, notwithstanding the well-known doctrine of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, and other cases that the law does not undertake to equalize or remove natural disadvantages of geographical location.

In the second paragraph on page 15 of the barge lines' motion is a statement that the Texas interests seek to have the Supreme Court substitute its judgment for that of the Commission. This statement is uncalled for. Everyone familiar with administrative law knows that the Commission's decisions are final and that they can be set aside only on a certain few grounds laid down by the Supreme Court.

Near the top of page 6 of the barge lines' motion reference is made to what the District Court had to say against

the evidence before the Commission as to average railroad system costs. In this connection it should be observed that according to *New York* v. *United States*, 331 U. S. 284; 328; 335,[3] the quality and effect of cost evidence is a question of fact for a transportation cost expert and that the Commission is expert in matters of transportation. In the case cited, the Supreme Court sanctioned average system costs as a basis for judging class rates.

The District Court was arbitrary in permitting the Commission's order to stand in the face of the fact that the Texas interests showed that the Commission required the prescribed differentials to be deducted from existing all-rail rates without any finding that the all-rail rates were reasonable as bases for such deductions. How could the Commission know whether the prescribed barge-rail rates would be reasonable or even compensatory without first knowing that the all-rail rates between the same points were reasonable and compensatory?

The District Court was arbitrary in permitting the Commission's order to stand in the face of the fact that the Texas interests showed that by the proviso[4] at the end of finding 2 in the Commission's report the Commission undertook to determine barge-rail rates by a test which takes into account only the rail portion of the through haul, and that portion only where it exceeds a certain measure. The conditions and circumstances pertaining to the through haul should be the determining consideration.

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[3] See also Illinois Commerce Commission v. United States, 292 U. S. 474, 481; and Baltimore & O. R. Co. v. United States, 298 U. S. 349, 359.

[4] It reads: * * * provided, however, that this finding * * * shall not require the establishment of barge-and-rail commodity rates between New Orleans and an interior point which shall be lower than the rate on the same commodity between Houston or Galveston and the same interior point where the short-line rail distance between such point and Houston or Galveston is not greater than the short-line rail distance between the same point and the port of interchange in the barge-and-rail route to or from New Orleans.

CONCLUSION.

The appellees' motions to affirm should be denied. The District Court should be reversed forthwith and the case remanded to it with instructions to issue the permanent injunction sought against the Commission's order.

Respectfully,

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April 10, 1950.

APPENDIX.

Relevant Provisions of the Constitution and Statutes.

THE CONSTITUTION, Article I, Section 9, Clause 6:
No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

THE INTERSTATE COMMERCE ACT:

NATIONAL TRANSPORTATION POLICY [Added September 18, 1940.] [U. S. Code, title 49, notes preceedings secs. 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1. 49 U. S. C. (1) (a)

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

SECTION 1 (5) (a) 49 U. S. C. 1 (5) (a). All charges made for any service rendered or to be rendered in the transpor-

tation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 3. (1) 49 U. S. C. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 307. (d) 49 U. S. C. 907(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. * * *

CERTIFICATE OF SERVICE.

I certify that a copy of the foregoing brief was served on counsel for all parties of record by mail on this tenth day of April, 1950.

WM. A. DISQUE

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[1] Consolidated with No. 45, The Alabama Great Southern Railroad Company et al. v. The United States of America et al. and No. 48, Savannah Sugar Refining Corporation et al. v. The United States of America et al.

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CONSTITUTION AND STATUTES.

Relevant provisions are quoted in Appendix No. 1 to this brief.

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OPINIONS BELOW.

The opinion of the three-judge District Court from which these appeals were taken is *Alabama Great Southern R. Co.* v. *United States*, 88 F. Supp. 982 (R. 173), the above named

[1] Consolidated with No. 45, The Alabama Great Southern Railroad Company et al. v. The United States of America et al. and No. 48, Savannah Sugar Refining Corporation et al. v. The United States of America et al.

appellants having been intervening complainants in the case in the District Court.

The Court in that case sustained the order of the Interstate Commerce Commission entered in I. C. C. Docket No. 26712, entitled *Rail and Barge Joint Rates*, covered by an original and a supplemental report, 270 I. C. C. 591 and 274 I. C. C. 229, respectively. (R. 16, 75, 78.)

JURISDICTION.

The judgment of the District Court, which dismissed the above named appellants' intervening complaint, as well as all other complaints arising out of I. C. C. Docket No. 26712, was entered on January 12, 1950. (R. 173-190) The appeals here involved were filed and allowed on March 7, 1950. (R. 198-213) The jurisdiction of this Court rests on Title 28 U. S. C. § 1253 and 2101(b), 62 Stat. 928, 962. Motions to affirm the judgment and decree of the District Court were filed by some of the appellees. Appellants filed briefs in opposition. Probable jurisdiction was noted on May 15, 1950. (R. 460)

RELATED APPEALS.

These appeals have been consolidated with No. 45, *The Alabama Great Southern Railroad Company* v. *United States et al.* and No. 48, *Savannah Sugar Refining Corp.* v. *United States et al.*

STATUTES AND PROVISION OF CONSTITUTION INVOLVED.

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C., and the Constitution are set out in Appendix No. 1 to this brief. They are also quoted in part in the body of the brief where that appears desirable.

THE RECORD.

There will be little need to refer to the record before the Commission. Therefore, under a stipulation among counsel for all the parties, that record was not printed, but is nevertheless part of the record on appeal. (R. 458) Where reference is herein made to particular parts of it, page and exhibit numbers will be prefixed by the initials "I. C. C."

QUESTIONS PRESENTED.

These questions relate particularly to the rail-barge rates between New Orleans, La., and points in the interior West as hereinafter described.

1. Whether the Commission has power to deprive Galveston and Houston, Texas, of their natural advantage of location by giving the competing port of New Orleans a system of rail-barge rates differentially lower than the corresponding rail rates when there is no showing of advantages in transportation conditions or the cost of performing the rail-barge service to justify differentials.

2. Whether the Commission can lawfully require rail-barge rates to be made lower than corresponding rail rates between the same points, when it finds that from a cost-of-service standpoint rail-barge transportation is not performed at any economy that would justify differentials.

3. Whether (if there is no valid finding as stated above) the Commission can lawfully require rail-barge rates to be made lower than corresponding rail rates between the same points unless the record positively shows that from a cost-of-service standpoint there is substantial economy in rail-barge transportation such as would justify differentials.

4. Whether inferiority of the rail-barge service, i.e., the lesser value of the service to the shipper, is a lawful ground for requiring differentials when the record affords no cost or other transportation justification for differentials.

5. Whether the Commission can lawfully require, as reasonable maxima, rail-barge rates made by deducting prescribed differentials from the corresponding rail rates between the same points, without finding, on appropriate evidence, that the rail rates themselves are up to a reasonable maximum level and that the rail-barge rates likewise would be up to such a level.

6. Whether the Commission, in the face of the anti-ports-preference clause of the Constitution, and in the absence of cost or other transportation justification for the differentials, can constitutionally require rail-barge rates for New Orleans, in the State of Louisiana, to be lower than the corresponding rail rates between the same points, when competing ports, such as Galveston and Houston, in another state, and served by rail only, have no such rail-barge rates.

7. Whether the Commission can lawfully prescribe differential rail-barge rates according to a formula which takes into account only the rail portion of the through haul; i.e., disregarding the barge portion of the haul.

8. Whether the Commission's order undertaking to require differential rail-barge rates is vitiated by errors of law, arbitrary action, lack of substantial evidence, lack of quasi-jurisdictional findings and/or lack of a rational basis?

THE PARTIES TO THIS BRIEF.

Galveston Chamber of Commerce is a voluntary non-profit organization representing the business interests of Galveston, Texas, especially as a port. One of its primary functions is to protect the city against unlawful freight rates, including preferential rates accorded competing ports, such as New Orleans.

Houston Port and Traffic Bureau is a non-profit organization, the constituents of which are local interests concerned with the protection and welfare of Houston, Texas, as a port. Fifty percent of its budget is supplied by the

Harris County Houston Ship Canal and Navigation District, a political sub-division of the State of Texas. Its functions are similar in all essential respects to those of the traffic department of a chamber of commerce, such as that at Galveston.

The Railroad Commission of Texas is a body duly established by the Constitution and Statutes of the State of Texas to investigate and prescribe rates, fares and charges for intrastate application within that State for common carriers operating therein, and is charged with the added duty of representing the State of Texas and the interests of its people in proceedings involving interstate rates.

The above-named concerns were parties at interest in the case before the Interstate Commerce Commission and the case before the District Court out of which the present action arose. They will be hereinafter referred to as the Texas interests.

These parties align themselves with the railroads, appellants in No. 45, but present some additional issues.

STATEMENT.

The action in the lower court was brought by various railroad companies to contest and enjoin the order of the Interstate Commerce Commission in a general investigation instituted on its own motion in docket No. 26712, entitled *Rail and Barge Joint Rates.* (R. 78) The order would require the observance of a prescribed new system of differentials to be deducted from all-rail rates to make joint rates for the through common-carrier transportation of package freight partly by rail and partly by river barge from and to various key points in the greater Mississippi Valley. The term "rail-barge" means also barge-rail or rail-barge-rail.

The Commission prescribed the new differentials in an original and supplemental report. (270 I. C. C. 591 and 274 I. C. C. 229; R. 16-77.) The effective date of its order has been postponed because of the pendency of this court proceeding.

A rather general system of rail-barge rates is already in effect in the territory involved and has been for a number of years. The present rail-barge rates in most instances are differentially much lower than the all-rail rates between the same points. The first rail-barge rates, which were limited in number, were established by the Director General of Railroads, shortly after he undertook the revival of barge transportation during the first World War under Congressional authority. Others were established in purported conformity with general principles outlined by the Commission in a complaint case brought by the War Department as operator of the Government's barge line in the early "twenties", a few years after it succeeded the Director General as operator of the river facilities. *U. S. War Department* v. *Abilene & S. Ry. Co.*, 77 I. C. C. 317; 92 I. C. C. 528; 151 I. C. C. 91. Later, in conformity with the Inland Waterways Corporation Act, 45 Stat. 979, 49 U. S. C. § 151-156, a comprehensive system of joint rates became effective under findings and orders of the Commission in connection with applications for operating rights by the Inland Waterways Corporation, which succeeded the War Department in 1924 and has since operated the facilities as the Federal Barge Line. Similar findings and orders in connection with applications by two other important river carriers, the Mississippi Valley Barge Line Company and The American Barge Line Company, further developed the fabric of joint rates. See *Procedure Under Barge Line Act*, 148 I. C. C. 129; *Through Routes and Joint Rates*, 153 I.C. C. 129; 156 I. C. C. 141; 163 I. C. C. 716; 172 I. C. C. 525; *Inland Waterways Corp.* v. *Chicago G. W. R. R.*, 129 I. C. C. 521; *Inland Waterways Corp.* v. *Aberdeen & R. R. Co.*, 183 I. C. C. 765; *Inland Waterways Corp. Through Routes and Joint Rates*, 192 I. C. C. 663; and *United States* v. *Illinois Central R. Co.*, 291 U. S. 457. Although the law under which the existing rates were prescribed has been repealed, the rates must continue in effect until ordered canceled. (Sec. 320 (e) of Interstate Commerce Act, 49 U. S. C. 153(e) quoted on p. 45, Appendix No. 1 hereto.)

The barge-line rates between river landings, i.e., the barge lines' own port-to-port rates, have, as a rule, for many years been made 20 percent below the corresponding all-rail rates between the same points and, generally speaking, the resulting differences in cents per 100 pounds on port-to-port traffic were used as the differentials for making the existing rail-barge rates embracing the same river transportation. For example, if the all-rail rate from New Orleans to St. Louis, Mo., on certain traffic were $1.00 per 100 pounds, the barge rate would be 80 cents, making a 20-cent difference, and the joint rail-barge rate from New Orleans to Jefferson City, Mo., for example, for a movement by barge as far as St. Louis and by rail beyond would be made 20 cents less than the all-rail rate from New Orleans to Jefferson City whatever it might be. The Commission's original report in No. 26712 covers these matters more fully and in more detail.

The rates required by the Commission's order here under review were prescribed in Findings 1 and 2 of its reports (R. 51, 52 and 76), based on the differentials named in the second, third, and fourth blocks of points in the first column on page 622 of the original report. (R. 55) Taking northbound traffic for illustration, these rates would apply by common-carrier barge up the Mississippi River from New Orleans to some river landing north thereof and thence by rail. The landing where the freight is transferred from barge to railroad car would be one of the many that are specified in connection with the differentials in the Commission's original report, dependent upon the location of the destination and the route beyond the transfer point.

The case of the Texas interests is directed primarily against the rail-barge rates between New Orleans, on the one hand, and interior western points between the Mississippi River and the Rocky Mountains, on the other. Galveston and Houston are ports of entry and egress for import, export, coastwise and intercoastal freight traffic having origin or destination in this interior territory. With

respect to that traffic which moves inland by rail from or to Galveston and Houston, these two ports are in keen competition with New Orleans. Galveston and Houston having no navigable waterway into the interior West, are generally confined to all-rail routes and rates. But New Orleans has, and under the Commisison's decision would continue to have, rail-barge rates from and to the interior West differentially much below the corresponding all-rail rates, notwithstanding the fact that the record in this case shows, and the Commission has found, that the rail-barge routes operate at costs that at least are as great as the all-rail costs. The present and prescribed rates for New Orleans are thus seen to be arbitrarily made lower than they should be. They would artificially afford competitive advantages for New Orleans interests, while depriving the Texas port interests of their inherent advantages of location and subjecting them to grave injustice and serious injury. This discrimination is particularly pronounced with respect to rates between New Orleans and a wedge-shaped territory embracing northwestern Louisiana, northeastern Texas, the eastern half of Oklahoma, the western half of Arkansas, western Missouri, most of Kansas, eastern Colorado, and states north of the three last mentioned. This territory includes such important points as Shreveport, La., Texarkana, Ark.-Tex., Oklahoma City and Tulsa, Okla., Fort Smith, Ark., Wichita and Hutchinson, Kan., Kansas City, Mo., and Denver, Colo. As is well known, it is a populous region; a great producing and consuming territory. It lies for the most part almost directly north of the Texas ports, but northwest of New Orleans. It is much farther from New Orleans than from the Texas ports. For example, Wichita is 627 miles from Houston, but 838 miles from New Orleans. Notwithstanding the much greater distances, New Orleans gets the same all-rail rates on a number of export and import commodities as the Texas ports, this having come about through the railroads' according New Orleans the Galveston and Houston rates for competitive reasons. The rail-barge differentials are deducted from these depressed

all-rail rates from and to New Orleans to make rail-barge rates, and New Orleans thus gets doubly depressed rail-barge rates which are even less than the all-rail rates charged Galveston and Houston. One example of how the Commission's decision works out should suffice. Imported green coffee from Brazil, shipped from New Orleans to Wichita, furnishes a good one. Wichita is a point as to which the railroads have accorded New Orleans the same all-rail rate as applies from Galveston and Houston to Wichita, viz.: 70 cents, regardless of the fact that New Orleans involves a much longer haul. Without going into detail suffice it to say that under the Commission's decision as we understand it New Orleans would get a rail-barge rate of 64 cents, while Galveston would continue to pay a rail rate of 70 cents, although it costs a rail-barge route at least as much to transport freight as a rail route.

At one of the several hearings in the Commission's proceeding the Galveston and Houston interests introduced a large amount of substantial evidence regarding their competition with New Orleans interests in drawing traffic from and shipping traffic into the interior West and regarding the adverse and injurious effect upon the Galveston and Houston interests of differential rail-barge rates between New Orleans and the interior territory. Among other things they showed the difficulties they faced in trying to induce new industries, distributing houses, importers, and exporters to locate at Galveston and Houston and told about efforts to build up a coffee market to serve the interior, which proved unsuccessful because of the competition from New Orleans unnaturally fostered by preferential rail-barge rates. Subsequently their opponents had ample time and opportunity to refute this affirmative proof, but did not do so. The testimony of the Texas interests occupied the best part of a day. It amounted to about 160 pages of transcript, and there were four exhibits. (I. C. C. R. 9466-9626; Exhibits 1032-1035.) See Appendix No. 2 hereto containing quotations from the transcript. The Texas interests filed a reply to the Federal Barge Lines' exceptions to

the Examiner's report, orally argued the case, and after the first report of the Commission they filed a petition for modification of the conclusions, thus giving the Commission opportunity to correct all errors.

However, Galveston and Houston got recognition from the Commission only in the form of passing mention in its original report; namely, in the final sentence of the paragraph ending near the bottom of page 611 (R. 42); in the final sentence of the paragraph ending at the top of page 616 (R. 48); in the paragraph at the bottom of page 617 (R. 50); and in the proviso in Finding 2, on page 619. (R. 52) Nowhere did the Commission set forth or even summarize the facts presented by the Texas interests or give them any assurance that their evidence had been adequately evaluated and considered at the time of the decision as it should have been under the law. Furthermore, the report made no finding pro or con on the issues raised by the Texas interests, but left those matters in the air.

Decisions of this Court set standards of conduct and action for administrative tribunals such as the Commission. Refusal to consider evidence of substance is arbitrary. *Chicago Junction Case*, 264 U. S. 258, at 265. By this means a regulatory body could tacitly sanction any unlawfulness. It is necessary to make findings essential to the constitutional and statutory validity of an order. *Florida* v. *United States*, 282 U. S. 194; 215; *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454; 465; and *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499; 504; 510. The grounds for the Commission's determination must be clear. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475; 488. A report should contain sufficient explication to enable the parties and the courts to understand, with a fair degree of assurance, why the Commission decides as it does. *Eastern-Central Assn.* v. *United States*, 321 U. S. 194; 211. *Republic Aviation Corp.* v. *National L. Rel. Bd.*, 324 U. S. 793; 803. The Commission was remiss in these respects. Its errors are fatal and constitute grounds for setting aside its reports and order.

ERRORS.

Appellants rely upon all errors specified in their assignments of errors (R. 199-209), but will direct their argument primarily to the following, which are fundamental and generally embrace the others. The lower Court erred:

1. In failing to set aside and enjoin the order of the Commission.

2. In holding that the findings of the Commission are clearly sufficient to sustain its order and that such findings are supported by substantial evidence, have a rational basis upon which to rest, and are not arbitrary.

3. In finding that neither the wording nor the legislative history of section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d) supports the conclusion that differentials are justified only where there is an affirmative showing of lower operating costs for barge-rail than for all-rail transportation.

4. In not finding that the record in the case before the Commission afforded no facts on which differentials could be justified for barge-rail rates between New Orleans and interior points west of the Mississippi River.

5. In not holding that the Commission unlawfully failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for the prescribed rail-barge rates for New Orleans.

6. In not holding that the Commission's reports and its order lack findings and conclusions essential to their constitutional and statutory validity respecting all rates prescribed and particularly those between New Orleans and interior points west of the Mississippi River.

7. In not holding that if the Commission is correct in construing the differential provision of Section 307(d) of the Interstate Commerce Act, 49 U. S. C. § 907(d), as a

mandate for rail-barge differentials for New Orleans regardless of whether factual justification exists, that provision is unconstitutional, in violation of Article 1, Section 9, Clause 6 of the Constitution, because the provision prefers Louisiana and other States having ports served by inland waterway carriers over Texas and other States having ports not so served.

8. In not holding that Finding 2 of the Commission, as revised in the supplemental report (274 I. C. C. at 230. R. 76), is arbitrary because the proviso therein undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure, disregarding the barge haul altogether.

9. In not holding that Finding 1 (270 I. C. C. at 619. R. 51), of the Commission is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, although the necessity for a limitation on the entire differential system is recognized in principle by the proviso in Finding 2.

SUMMARY OF ARGUMENT.

The Commission's order was made under purported authority of section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d), which provides that the Commission may require such reasonable differentials in connection with joint rates between rail carriers and water carriers "as it may find to be justified". In administrative law this means that the prescribed rates must be justified as reasonable by proved facts upon a formal record. The Commission stated in its report that it could not find that rail-barge routes could operate at any cost economy, compared with rail routes, which would justify differentials. (270 I. C. C. at 606. R. 36.) Nevertheless, it ordered differential rates because it believed Congress wanted that done, for the purpose of fostering water carriers. (270 I. C. C. at 610. R.

40.) However, the national transportation policy of Congress as declared in the Interstate Commerce Act at the time of the enactment of section 307(d) is that the advantages and disadvantages of each competing form of transportation shall be recognized and preserved in making rates. (Quoted on p. 44, Appendix No. 1 hereto.)

The Commission appears to have sought to bolster its action by the proved fact that rail-barge service is inferior to rail service and is therefore worth less to the shipper. However, it has always held, and properly so, that economy in cost is the primary or basic reason for differentials. Value of the service is merely a secondary and subordinate element in rate making and can not rationally be used as a justification in the face of the failure of the barge lines to prove that they have any cost economy.

The privately-owned barge lines find this traffic generally unprofitable and for that reason have embargoed practically all of it. The Federal Barge Line still handles the traffic, although its facilities are antiquated and in bad repair and although it has operated at a loss almost continuously since it was organized. If the privately-owned lines cannot handle the traffic at a profit, it is natural to conclude that Federal can not. Federal has offered nothing to dispel the doubt, and it is unlawful for a carrier to handle traffic at a loss.

The Commission in arbitrarily disregarding costs and transportation conditions and irrationally using value of service as a justification for differentials, *ipso facto* would accord New Orleans a system of rail-barge rates which being unnaturally low would unduly prefer that port over the competing ports of Galveston and Houston. The Commission thus obviously violates section 3(1) of the Interstate Commerce Act, which prohibits undue prejudice to ports, and which it was constituted to enforce.

The Commission prescribed the differentials without determining whether they would result in reasonable rates for the rail-barge routes. The Commission cannot lawfully prescribe a rate level unless it finds it to be reasonable.

The Commission in prescribing rates in disregard of cost has construed the differential provision of section 307(d) of the Interstate Commerce Act as a mandate to favor rail-barge routes without justification in fact. If it is correct in its construction, that provision is unconstitutional, in violation of the anti-ports-preference clause of the Constitution, because it arbitrarily prefers States having ports, such as New Orleans, served by inland waterways, over ports of other States not so served, the preference being arbitrary because it is not based on any fact, but solely on Congressional fiat.

The Commission has prescribed rates which arbitrarily take into account only the rail portion of the through haul; that is, they disregard the barge haul altogether. This matter is fully explained later in the brief.

ARGUMENT.

I.

Irrational and Arbitrary Disregard of Costs and Other Transportation Conditions.

The Commission in prescribing these new rates acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 54 Stat. 937 (49 U. S. C. § 907(d)), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

This provision is complementary to sections 15(1) and 15(3) of the Interstate Commerce Act, 49 U. S. C. 15(1) and 15(3), which empower the Commission to prescribe reasonable joint rates, including rail-water rates.

The record before the Commission contained a large amount of evidence regarding what it cost all-rail routes as compared with rail-barge routes to transport freight. This evidence, consisting of oral testimony and exhibits, was offered by witnesses on both sides. It was referred by the Commission to members of an employee staff of cost-finding experts, who analyzed it and at one of the hearings presented a summary thereof, adequately supported by detailed data, explanations and reasons. The general conclusion of the experts was that rail-barge costs exceeded rail costs, due largely to the relatively high cost of barge terminal operations and the cost of handling the freight between barges and railroads at river-landing transfer points. (270 I. C. C. at 604. R. 33.) After considering this matter, together with continued Federal Barge Line deficits and privately-owned barge-line refusals to handle the traffic in question because it was generally unprofitable, the Commission made the following statement:

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials. (270 I. C. C. at p. 606) (R. 36)

In other words, the Commission could find no cost basis for prescribing rail-barge rates. The District court treated the above-quoted statement of the Commission as a "negative conclusion, which does not constitute an affirmative finding that all-rail costs are lower than barge-rail costs", and the court held that the railroads had failed to establish that rail-barge costs were as great as or greater than rail costs. (88 F. Supp. at 987. R. 183.) However, we say that the Commission's language plainly means only one thing, namely, that rail-barge costs are at least as great as rail costs. The evidence certainly called for an affirmative finding to this effect and it was error if the Commission's statement was negative. Furthermore, if the Commission

felt that the cost data called for only a negative conclusion or were for any reason unusable, it was its duty to further investigate and get satisfactory data, because under the very terms of the differential provision of section 307(d) it has the duty of *finding justification* before prescribing differentials; and justification in cost or transportation conditions is essential in a case of this kind. It is here interesting to note that about ten years ago, after the Commission got rather complete jurisdiction over motor and water transportation, as it already had over rail transportation, it set up and developed in its organization a well-equipped cost-finding staff. In other words, the Commission was fully conscious of the fact that, in order to properly regulate competing forms of transportation, data as relative costs were necessary. It was members of this cost-finding staff who testified, as above stated, that barge-rail costs exceed all-rail costs.

In *Petroleum and Petroleum Products, Calif., to Ariz.*, 241 I. C. C. 21, the Commission was investigating the rates of two competing forms of parallel transportation, viz.: railroads and motor carriers. At page 241 of its report, it referred to the national transportation policy as then expressed in the Interstate Commerce Act with respect to railroads, and the policy declared in the Motor Carrier Act with respect to motor carriers. These policies, or rules of rate making, particularly so far as the present case is concerned, were not materially different in principle from the policy now stated in the opening paragraph of the Interstate Commerce Act (quoted on p. 41, Appendix No. 1 hereto) which requires equality of treatment for all regulated forms of transportation and preservation of the advantages enjoyed by each. The Commission then went on and said:

> The corresponding rule of rate making for motor-carrier rates is contained in section 216(i) of the Motor-carrier act. The two rules are practically identical except that the motor-carrier rule contains the added

direction that consideration shall be given "to the inherent advantages of transportation by such carriers." This additional provision was included to make certain that the motor carriers would be regulated with a view to the conditions inherent in the motor-transportation industry without regard to the interest of any other mode of transportation. In fairness, we should give consideration to the inherent advantages of transportation by rail when rates by rail carriers are before us, particularly in a proceeding where competing rates of motor carriers are also under review. The two rules for rate making, together with section 202(a), indicate the policy of Congress to be that in the regulation of these transportation agencies we should recognize and preserve in the interest of the public the inherent advantages of each. *The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petrolum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity carried are of less importance.* (Italics ours.)

Particular attention is called to the italicized portion of this quotation, which mentions cost as a dominant element. In considering the rates of competing forms of transportation, cost surely is a dominant element and should not be wholly disregarded as the appellees contend it may be. It was the duty of the Commission to consider relative costs in this case. Cost is too important an element to be cast aside. It is always a basic, primary and necessary consideration in cases of this kind. *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, at 133 and 144; *Through Routes and Joint Rates*, 153 I. C. C. 129, at 133; *Inland Waterways Corp.* v. *Aberdeen & R. R.*, 183 I. C. C. 761 at 765.

The Commission held in the present case that an affirmative showing of cost economy for the rail-barge routes was not necessary to justify the prescription of differentials. (270 I. C. C. at 611. R. 41.) The lower court has the same view, but neither body cites any authorities. (88 F. Supp. at 987. R. 179.) Regardless of whether the showing has to be affirmative, the truth is that a record must contain facts that justify the differentials. The Commission, after finding no cost justification for differentials, stated that in no instance had it ever declined to prescribe or approve differential rates because the economy of barge service had not been affirmatively shown. (270 I. C. C. at 611. R. 41.) Its statement is at variance with finding 2 in the earliest Federal Barge Line case, *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, at 362, decided February 6, 1923, where the Commission said it was not persuaded that the rail-barge rates there sought should be established where the barge line's share of the joint haul would be so short that interchange expenses at the river-landing transfer point would be so great as to off-set the lower cost of water transportation, which is just the situation presented in the present case. It probably is true that after the enactment of the Denison Act, May 29, 1928, 45 Stat. 980, the Commission did not decline to prescribe or approve differential rates where affirmative proof of economy was lacking, because under that Act it felt that it had a mandate provisionally to prescribe such rates without a hearing. See *United States* v. *Illinois Central R. Co.*, 291 U. S. 457. That was based on the traditional belief then prevailing that port-to-port barge service could be performed more economically than rail service, and that the economy should be reflected in rail-barge rates upon the assumption or presumption that rail-barge costs were lower than rail costs. However, the Denison Act was repealed October 1, 1940, by § 320(e) of the Interstate Commerce Act, 54 Stat. 95 (49 U. S. C. § 920) long before the Commission prescribed the rates covered by the order here under review and so far as these rates are

concerned the Commission was bound to operate under the Interstate Commerce Act alone, which did not give it freedom to disregard sound and important principles of law and rationality. It was the prescription of rail-barge rates without hearings and without facts, which finally brought railroad complaints and precipitated the Commission's investigation giving rise to this court proceeding.

There would be no reason to think that the cost situation as disclosed by this record is anomalous or absurd. It is axiomatic that water carriers, operating on public waters, do not have to provide and maintain roadways, and that their costs accordingly represent, in unusual degree, their terminal and interchange operations performed by labor forces. During the past few decades wages have risen out of proportion to other things and thus have disrupted the relative costs of rail versus water transportation. It is interesting to here note a most recent decision of the Commission. *All-Rail Commodity Rates between California, Oregon and Washington*, 277 I. C. C. 511, where (at p. 554-564) it was found that the cost of moving freight between California and the North Pacific Coast was less by rail than by ship. An assumption or presumption that rail-barge transportation can be performed at less cost than rail transportation is entirely without foundation.

In disregarding cost and transportation conditions the Commission acted arbitrarily and without a rational basis.

II.

Assumed Mandate to Prescribe Rail-Barge Rates.

The Commission in its report indicates that it prescribed the differential rates primarily because it believed that Congress wanted it to foster water carriers. Its belief was gathered from legislative history antecedent to the enactment of section 307(d) of the Interstate Commerce Act and from section 3(c) of the Inland Waterways Corporation Act (p. 39, Appendix No. 1 hereto), which latter declares it to be the policy of Congress to continue the transporta-

tion services of the corporation until, among other conditions, rail-water rates are generally available *reasonably fair to both rail and water carriers.* (270 I. C. C. at 610. R. 40.) In so far as it may have a bearing on the Commission's duties, this statutory provision means only that rates and divisions prescribed by the Commission must be just and reasonable and in accord with the declared national transportation policy. The lower court stated that "the Commission placed great emphasis on what is conceived to be the policy of Congress." (88 F. Supp. 987. R. 179.) However, it is clear that Congress did not give the Commission any mandate or directive in respect of the above matter, for at the very time it enacted section 307(d) it formally declared in the opening paragraph of the Interstate Commerce Act that the national transportation policy contemplated fair and impartial regulation of all modes of transportation. (Quoted on p. 41, Appendix 1 hereto.) Even if Congress had given the Commission a mandate or directive it could not lawfully have been used as a basis for the prescription of differentials for the rail-barge routes unless on the facts of record such action was warranted under sections 1(5)(a) and 15(1) of the Act, irrespective of the mandate or directive. In other words, the record would have to show that the prescribed rates were just and reasonable according to accepted and usual standards. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and *United States* v. *New York Central R. Co.*, 263 U. S. 603.

III.

Irrational Use of Value of the Service as an Element of Rate-Making.

The District court says that numerous factors besides the Commission's conception of the policy of Congress were considered by the Commission. (88 F. Supp. 987. R. 179.) If they exist, they are difficult to find or identify. Apparently what the court had in mind was the discussion in the

Commission's report under the heading "The Shippers' Interest in Rail-Barge Transportation." (270 I. C. C. at 606-609. R. 36-39.) The only thing the court particularly dwells upon is the fact that the rail-barge service is inferior to rail service; that is, the value of the service to the shipper is less via rail-barge, due to slow movement. (88 F. Supp. 987-988. R. 177-180.) The other things it mentions in passing boil down to the idea of artificially promoting rail-barge transportation at the expense of the railroads.

Aside from an assumed Congressional policy, about the only rate-making factor possibly used by the Commission as justification was the value-of-service element. Application of that factor here, if that was what occurred, with costs and transportation conditions disregarded, was absolutely irrational to the nth degree. It was nothing short of an arbitrary move to divert traffic from the railroads to the rail-barge routes, and its disastrous effect, so far as we are concerned, was to prefer the port of New Orleans over the ports of Galveston and Houston.

Let us examine the value of the service element. In considering the price it should charge for a service, the carrier's first duty to itself and the public is to see that the rate yields profit. No carrier can stay in business indefinitely if it follows any different policy. After it has an idea of what its costs and its profit in handling a particular traffic may be, on the basis of a normal or mathematical distribution of indirect, or general overhead, expenses it can consider the value of the service to the shipper. That is always and necessarily an ancillary and subordinate element in rate-making, because always and necessarily it must be coupled with a basic element, viz.: cost of service or transportation conditions. Obviously, application of the value-of-service element has limits. It can extend to only a portion of the margin of profit. It is merely a tempering, mollifying, or moderating treatment. For a carrier to use value of service as a primary and practically exclusive ele-

ment would constitute commercial dissipation and destructive practice. The Commission, in the nature of things, must be governed accordingly in prescribing rates. When it prescribes rates on the basis of value of service it must know that they will yield fair profit. It could not have known that upon this record. In the absence of justification in cost or transportation conditions, evidence respecting such things as value of the service furnish the other side with nothing more than talking points.

The District Court states that the Commission has previously designated the lesser value of the rail-barge service as one basis for differentials. (88 F. Supp. 987. R. 179-180.) It cites *Inland Waterways Corp.* v. *Alabama Great Southern R. Co.*, 151 I. C. C. 126, at 144, but its statement is narrow and incomplete and therefore leaves a very wrong impression. What the Commission said was this:

> The barge-line differentials are based upon *the premise* that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost. (Italics ours.)

The Commission did not there say that inferiority of service could be considered as substantially the sole justification for differentials, but made it plain that inferiority of service as a justification had to be accompanied by lower costs. It coupled cost of service and value of service and spoke of the two as "the premise". It may be said incidentally that the Commission did there prescribe rail-barge rates, in the face of a finding that "the evidence in regard to cost of service is meager", but that was over 20 years ago, when it was the common practice to do so, in accordance with the Denison Act, since repealed as already mentioned.

The District Court gravely erred in taking such considerations as value of service as basic and important elements,

particularly in view of its complete disregard of costs and transportation conditions. Neither the court nor the Commission had a rational basis for its action. We are not overlooking such things as administrative finality and the Commission's recognized expertness in matters of rate-making. What we are here dealing with is abuse of discretion, which of course is unlawful under well-known decisions of this court.

IV.

Rail-Barge Traffic Handled at Less Than Cost.

In view of the facts we are about to relate, bearing upon cost and transportation conditions, we fail to see how the rates which the Commission has undertaken to impose upon the rail-barge routes could, by any stretch of the imagination, be said to have been justified on the record as just and reasonable. In other words, we say that the Commission was arbitrary.

Here is something the Commission said in its report:

> In his testimony before the subcommittee mentioned above, Federal's president stated that "many large operators, private, contract, and common carriers have better, more efficient fleets and provide faster and more dependable service than the Federal barge lines." He pointed out, however, that the private lines[1] have also encountered the problem of rising terminal costs and *do not want* most types of merchandise freight because of the high cost of handling it under present terminal methods.
>
> This development is illustrated by the experience of Valley,[2] whose increasing proportion of bulk freight since 1941 has previously been mentioned. In that year it interchanged more than 325,000 tons of freight with railroads, but in 1947 its joint traffic was only 37,000 tons. This decline of 89 percent apparently was due in large part to embargoes placed against rail-barge traffic by Valley *in order to avoid a serious loss*

[1] Obviously means "privately owned".

[2] Means Mississippi Valley Barge Line Company.

> *of revenue* owing to the expense of transferring freight between barges and railroad cars. Although it still has some hope of profitable participation in this joint traffic at a future time, the outlook is obscure. (Emphasis supplied.) (270 I. C. C. at 606. R. 35.)

The Commission noticed that the Mississippi Valley Barge Line's rail-barge traffic in 1947 was less than 2 percent of its total traffic, compared with more than 55 percent in 1941. (270 I. C. C. at p. 596, R. 23) The Commission also noticed that the American Barge Line's rail-barge traffic was insignificant in 1947, having been but 3,084 tons, as against its total traffic of 1,385,666 tons. (270 I. C. C. at 597, R. 24) Federal, in the five years immediately before the war, handled about a million tons per year, but the figure for 1947 was only 369,217 tons. (270 I. C. C. at 595, R. 22)

The embargoes mentioned in the above quotation were laid to avoid unprofitable traffic and not because of the physical inability of the carrier due to congestion, strikes, or other emergencies. We have always understood that embargoes were legally justifiable only as a temporary means of avoiding traffic that a carrier was physically unable to handle. Our New Orleans opponents in this very case must have the same understanding, for they have filed with the Commission some formal complaints alleging that embargoes of the above two privately owned barge lines at New Orleans against package traffic are unlawful. No. 30118, *New Orleans Traffic and Transportation Bureau* v. *Mississippi Valley Barge Line Company*, covering all the traffic, and No. 30123, *New Orleans Traffic and Transportation Bureau* v. *American Barge Line Company*, covering the north-bound traffic. The cases have been heard and are awaiting oral argument. The defendant barge lines are here in the anomalous position of fighting for confiscatory rates.

It can not be assumed that Federal is able to handle this traffic at a profit if the two other lines can not, for while the

Mississippi Valley and American barge lines have been consistent money makers, Federal has generally operated at a loss since it was organized over 30 years ago. (270 I. C. C. at 595-596, R. 22) We here ask the court to read and absorb what the Commission says about the dilapidated condition of Federal's facilities and high operating expenses. (270 I. C. C. at 604-606, R. 33-35) The only thing that Federal offered the Commission in this connection was a statement of hope. If the facilities were so run down three years ago, they must be in worse condition today. If the additional subsidy of $17,000,000 mentioned in the report was needed in 1947, (270 I. C. C. at 605, R. 34) how much is needed in this present period of high prices? And what about the interest on the money?

For all practical purposes it may be said that Federal is now the only barge line participating in rail-barge traffic. For policy reasons, including the fact that the line was established as a temporary Government experiment in river transportation to serve the public, its officials may not feel free to refuse or actually discourage the business. They apparently do not concern themselves about losses as the privately owned lines do. Federal is subsidized and its financial needs are thus taken care of largely out of public funds derived from taxes paid directly or indirectly by everybody, instead of by the users of the service. However, it is unlawful for a carrier to handle business at a loss. Traffic that does not contribute in fair proportion to a carrier's needs places a burden on other traffic. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, at 602-604. Although Federal is a Government agency, its affairs must be conducted according to law and sound business standards if it is to be a true experiment. *U. S. War Department v. A. & S. Ry. Co.*, 92 I. C. C. 528 at 535.

The lower court did not overlook the facts above outlined, but seems not to have gotten their full import. There is no book-keeping proof stated in dollars and cents that rail-barge traffic is and would be handled at a loss, but the

testimony referred to in the above quotation and the fact that the privately owned barge lines, according to the latest data, are practically out of this business, cast over this traffic a very dark shadow which the record does not dispel. The barge lines are the parties who sought the continuance of rail-barge rates and they therefore had the obligation of resenting convincing proof that rates were "justified" as just and reasonable under sections 1(4), 1(5)(a) and 307(d) of the Interstate Commerce Act and of showing what those rates should be. They failed. And it was not for us to prove that the differentials were just and reasonable.

For the Commission to override these facts and their plain significance without positive evidence that the rates would yield sufficient profit to make them just and reasonable maxima was arbitrary. Upon a proper record the Commission has power to force rates down to a reasonable maximum level or force them up to a reasonable minimum level, but it has no power to require carriers to take freight at less than a reasonable maximum level, because that would unconstitutionally deprive the carriers of their property right to a reasonable return. *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585.

V.

The Prescribed Rates Violate the Declared National Transportation Policy.

The Commission prescribed the preferential rail-barge rates for New Orleans and other points through misunderstanding of the national transportation policy declared by Congress in the opening paragraph preceeding § 1, of the Interstate Commerce Act, 54 Stat. 899. (49 U. S. C.) (Quoted at p. 41, Appendix No. 1.) The portion of the declaration here pertinent is quoted below for convenience:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation sub-

ject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * *

As applied to this case the quoted phrase contemplates a recognition and preservation of the inherent *advantages* of rail versus rail-barge service. What are the inherent advantages of rail-barge service which are claimed to justify differentials? None have been proved. The rail-barge routes have nothing to offer except *disadvantages*, namely, high costs, losses and inferior service. For the Commission arbitrarily to prescribe rates that overcome these disadvantages is to deprive the rail routes of their advantages.

Under Reorganization Plan No. II, 53 Stat. 1434, the Secretary of Commerce has operated the Federal Barge Line since July 1, 1939. His printed report to the President of the United States, dated December 1, 1949, entitled "Issues Involved in a Unified and Coordinated Federal Program For Transportation," contains the following language beginning new the bottom of page 45:

"* * * the Government should consider continuing its various promotional programs along lines which call for payment by the user for the various facilities. Government regulatory agencies should simultaneously consider the elimination of rates which are not closely related to the fully distributed cost of rendering the service. If action along both lines were to proceed at the same time, most of the legitimate complaints which the railroads have against their competing carriers would be eliminated and most of the legitimate complaints which water and motor carriers have against the rail carriers would be disposed of. The net result would be a more effective use of transport resources with each type of carrier performing the various services in which it had a cost advantage. This, after all, is the basic objective of the Transportation Act of 1940, and action of the sort just described appears necessary in order that the objective of the 1940 act may be realized."

We cannot reconcile these sound statements of the governing head of the Federal Barge Line with the position taken by that line's officials in this case.

This is not a case in which one form of transportation is voluntarily making rates to meet a competing parallel form by the maintenance of compensatory rates, but one in which the power of the Government is sought to be used unlawfully to compel one form of transportation which has a natural cost-of-service advantage to give up traffic and revenue to a high-cost competing form. The Commission and the lower court fell into fatal error by failing to recognize this distinction.

The Commission mentions the fact that the barge lines are willing to allow their railroad connections the same divisions or proportions of the through joint rates as the same railroads get out of joint rail rates applying via the same interchange or junction point. (270 I. C. C. at 612-613, R. 44) The lower Court also refers to the same matter. (88 F. Supp. at 987) (R. 179) Both tribunals imply that it helps the barge-line side of the case. Superficially it sounds plausible and therefore makes a talking point for the barge lines, but really there is nothing to it. It is simply a device for sucking traffic out of railroad channels. Suppose a rail rate of $1.00 from New Orleans to Wichita divides by allowing the railroad from New Orleans to Memphis 40 cents and the railroad from Memphis to Wichita 60 cents. Suppose the rate from New Orleans to Wichita via barge to Memphis and rail thence to Wichita is 85 cents. The barge line would allow the railroad west of Memphis its established division of 60 cents and accept the remainder of 25 cents as its own division, thus absorbing the 15-cent differential out of its own pocket. The barge-line argument is that the railroad west of Memphis should be satisfied. But what happens to the railroad south of Memphis? And incidentally this could be the same railroad as runs west of Memphis to Wichita. It loses the traffic to the barge line, although it has proved that the through costs of rail trans-

portation exceed those for rail-barge transportation and although the barge line has not proved that the rail-barge routes can handle the traffic at less cost than the railroads. This divisional device originated years ago, when it was commonly understood or believed that rail-barge transportation costs less to perform than rail transportation. Now that the reverse is true, it is a burden on the economy of the country for the Government to force the railroads to give up part of the haul and revenue on this traffic to a higher cost form of transportation. It is a violation of the declared national transportation policy. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 576, at p. 574, 579. It is a bleeding of the railroads to artificially nurture the barge lines.

The Texas interests are not here undertaking to speak for the railroads, but for our own protection we must resist the vicious discrimination which the Commission would inflict and fasten upon us by the preference it would accord New Orleans.

VI.

The Commission Has Unlawfully Undertaken to Prescribe Rates Indirectly, Without Knowing Whether They Are Just and Reasonable.

The Commission in this case prescribed the relations it says should exist between the rail and the rail-barge rates. Its reports do not indicate that it even considered what the resulting rail-barge rates would be.

The District Court was arbitrary in permitting the Commission's order to stand in the face of a showing that the Commission required the prescribed differentials to be deducted from existing all-rail rates without any finding that the all-rail rates were reasonable as bases for such deductions. How could the Commission know whether the prescribed barge-rail rates would be reasonable or even compensatory without first knowing that the all-rail rates between the same points were reasonable? The Commission took a random shot in the dark. Even if the differen-

tials had been justified by the record, how could it be found as a conclusion that they would result in reasonable and lawful rates, for instance, on imported coffee, newsprint paper, sisal, bagging, canned goods, etc., without facts of record which prove that such rates are each reasonable and otherwise lawful and without findings of fact to support the conclusion? In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, this Court affirmed a decree setting aside an order wherein the Commission undertook to condemn a proposal of a carrier to reduce certain of its rates on coal to a particular level, the Commission having failed to find that the proposed rates represented a departure from a rate relation that was intrinsically sound and fair. The Commission's decision there under review, like the one here, was based on the idea that certain rates must be maintained, even if unsound. The Court there pointed out that an order of the Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power.

For a pointed example of what the Commission has done let us again take coffee from New Orleans to Wichita. The all-rail rate is 70 cents. The prescribed rail-barge rate, as we construe the reports and order, is 64 cents. We ask opposing counsel to cite the facts of record which show that the 70-cent rate is up to the level of maximum reasonableness for all-rail transportation and the facts of record which show that the 64 cent rate is up to the limit of maximum reasonableness for rail-barge transportation. We do not know of such facts. The Commission cannot lawfully order the carriers to reduce or keep down a rate unless it exceeds the limit of maximum reasonableness. Section 1(5)(a) of the Interstate Commerce Act provides that all rates must be just and reasonable and section 15(1) and 307(d) of that Act provide the Commission with power to prescribe such rates. In the nature of things, the Commission cannot order a rate *down* to a level which is below the limit of maximum reasonableness, because it

would thus unconstitutionally deprive the carriers of their property right to a reasonable return. *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585. The only other power the Commission has with respect to the level of rates is to order them up to a minimum reasonable level, which matter is not here involved.

For these reasons the Commission's order should be held void.

VII.

Undue Prejudice to the Texas Ports.

Due to the Commission's arbitrary and irrational disregard of the evidence and its finding respecting the lack of economy in rail-barge service it prescribed rates for New Orleans that have no support in law and which therefore afford that point unlawful advantages over Galveston and Houston. In other words, the Commission proceeded to violate the law it was duty-bound to enforce, particularly section 3(1) of the Interstate Commerce Act, 49 U. S. C. § (1), which prohibits undue preference and prejudice of ports. Generally speaking, the railroads which necessarily and effectively participate in the rail-barge rates between New Orleans and the interior West are the ones which serve Galveston and Houston with their own rails or necessarily and effectively participate with others in joint all-rail rates from and to those ports within the meaning of *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 650.

The Court proceeds on the basis that if the differentials are lawful, New Orleans gets only what it is entitled to and that Galveston and Houston, not favored with a barge line into the territory west of the Mississippi River, can have no legal ground for complaint, because the law does not undertake to equalize natural advantages. (88 F. Supp. at 989-990, R. 183-184) The Court seems to have misunderstood us. We tried to make it clear that we sought no artificial advantages. Our position was that New Orleans was so situated geographically as to possess only natural disadvantages over Galveston and Houston, but was allowed

to ship to and from the West on lower barge-rail rates than were justified by facts, and that it was therefore the recipient of artificial advantages.

Instead of prescribing preferential rates for New Orleans the Commission should have found that the existing rail-barge rates were not justified and ordered them increased at least to the level of the all rail rates to cure the preference that has existed for years. The Commission was arbitrary in not doing so. Naturally, as there is no justification for the newly prescribed rates, there is none for the present rates.

VIII.

Unconstitutionality of the Differential Provision.

Under the Commission's construction and application of the above-mentioned differential provision of section 307(d) of the Interstate Commerce Act, New Orleans gets prescribed rail-barge differential rates from and to the interior West relatively and absolutely lower than the competing ports of Galveston and Houston have over all-rail routes, regardless of the fact that there are no facts of record to justify the discrimination.

The Constitution of the United States, in Article 1, Section 9, Clause 6, provides that:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: * * *

In *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, the Supreme Court, after beginning a discussion of this clause of the Constitution, as it affects certain kinds of legislation, says, at the middle of page 435, that the prohibition against preference "may, certainly, embrace any other description of legislation looking to a direct privilege or preference of the ports of one State over those of another."

Congress in the nature of things has the right to designate certain points as ports of egress and entry, but when it has done so, it must of course treat all of the States alike

in matters affecting competition for commerce, except where there is some real and natural differences in circumstance and conditions. In other words, Congress can not, within the Constitution, arbitrarily say that the ports of certain States shall or may have unduly favorable rates.

If the differential clause of section 307(d) of the Interstate Commerce Act means what the Commission plainly thinks it means, that is, if it is a mandate from Congress to prescribe differentials without a factual basis in the record, it is unconstitutional, because it arbitrarily affords the State of Louisiana a preference over the State of Texas. The State of Louisiana and its citizens, through the preference that would be given the port of New Orleans by the prescribed rates, would be beneficially affected to the detriment of the State of Texas and its citizens. As construed by the Commission, the differential clause of section 307(d) is positive legislation providing arbitrary direct blanket preference of any State having a port served by a Commission-regulated water carrier which through rail-barge routes reaches a given inland territory in competition with all-rail routes. States having ports served only by all-rail routes reaching the same inland territory suffer unjustifiable discrimination.

It is, of course, hard to believe that Congress intended to prefer any State. We do not think it did intend to do so. We say that if you assume that the Commission's construction of the differential clause of section 307(d) is correct, it necessarily follows that Congress did in fact unconstitutionally prefer Louisiana and other States which have a port served by Commission-regulated water carriers, and did unconstitutionally discriminate against Texas and other States having no port so served. We say our contention is correct because the Commission in effect holds that it is bound to accord the rail-barge routes a differentially lower basis of joint rates with the railroads, even though such rates are not justified by facts found in the evidence. It follows, according to the Commission's construction and application of section 307(d), that if the rates are not justi-

fied by the record, Louisiana derives its port rate advantages artificially from arbitrary action by Congress; and not from the geographical location of New Orleans or from transportation circumstances and conditions surrounding movements from and to that port. And we should add that the Commission has many times held that it is not its function to so adjust rates as to afford any city or community artificial advantages or to require rates which will deprive a city or community of its natural advantages of location. See *Schroon River Pulp & Paper Co.* v. *Delaware & H. Co.*, 169 I. C. C. 435, 438; *Iron and Steel Articles from the South*, 176 I. C. C. 345, 353; and *Scrap or Waste Paper*, 179 I. C. C. 71, 74; supported by *Interstate Com. Com.* v. *Diffenbaugh*, 222 U. S. 42, at p. 46.

This discussion goes to show either that the differential provision of section 307(d) is unconstitutional or that the Commission's construction and application thereof, is wrong. In other words, if the differential provision is a mandate, it is unconstitutional; if it is not a mandate, there is here no basis for the prescription of differentials, for the record affords no justifying facts. Either view leads irresistibly to the conclusion that the Commission's order is unlawful.

IX.

Finding 2 is Arbitrary.

Finding 2 in the Commission's supplemental report (274 I. C. C. at 230, R. 76), is arbitrary. There are instances in which the prescribed rail-barge rates are much lower between New Orleans and interior western points than the all-rail rates between Galveston or Houston and the same interior points, notwithstanding the fact that the rail and rail-barge distances between New Orleans and those interior points are far greater than the rail distances between the Texas ports and the interior points. There are also startling and almost unbelievable instances in which the rail leg of the haul, that is, west of the river-landing trans-

fer point to the interior point, for example from Memphis inland, is almost as great as the all-rail distance from Galveston or Houston. In other words, the freight, after it gets off the barge at the river-landing transfer point, is as far, or almost as far, from destination as an all-rail shipment would be when it started from Galveston or Houston. There are, in addition, some instances in which the rail leg of the haul west of the river-landing transfer point is even greater than the distance between Galveston or Houston and the interior point.

Finding 2, as revised in the supplemental report, after prescribing that rail-barge commodity rates shall be related to the corresponding class rates by the use of a given percentage formula, contains a proviso[3] to restrict situations of the above kind, so far as commodity rates are concerned. The proviso in substance is that under the decision New Orleans is not to get a lower rail-barge commodity rate than Galveston or Houston where the rail distance west of the river-landing transfer point equals or exceeds the distance between Galveston or Houston and the interior point. It leaves unrestricted the situations where the rail distances west of the transfer point are less, notwithstanding the fact that the traffic from or to New Orleans has to move generally several hundred miles on the Mississippi by barge in addition to moving by rail practically as far as it would if shipped between Galveston or Houston and the interior western point.

Having recognized that a restriction is necessary for the protection of Galveston and Houston where the distances beyond the river-landing transfer point equal or exceed

[3] It reads: * * * provided, however, that this finding * * * shall not require the establishment of barge-and-rail commodity rates between New Orleans and an interior point which shall be lower than the rate on the same commodity between Houston or Galveston and the same interior point where the shortline rail distance between such point and Houston or Galveston is not greater than the short-line rail distance between the same point and the port of interchange in the barge-and-rail route to or from New Orleans.

those between Galveston or Houston and the interior western point, it is an unlawful abuse of discretion to refuse in the same breath a limitation where the distances beyond the river-landing transfer point are less. The proviso therefore makes Finding 2 arbitrary and unlawful, because it undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul, and that portion only where it exceeds a certain measure. The cost of the through rail-barge haul with relation to the cost of the all-rail haul should be the determining consideration.

After the issuance of the Commission's first report the Texas interveners filed a petition with the Commission suggesting an appropriate formula evaluating the barge service in terms of rail miles for addition to the rail distances between the river-lading transfer points and the interior points to arrive at through distances between New Orleans and the interior points for comparison with the all-rail distances between Galveston and Houston and the interior points. The suggested formula was of the kind used by the Commission in a previous rail-barge case, Ex Parte 96, entitled *Inland Waterways Corp., Through Routes and Rates*, 192 I. C. C. 663. In that case the Commission required the joint rail-barge routes to treat the barge service for the river distance of 1547 miles between New Orleans and Kansas City as the equivalent of 660 rail miles, this being approximately two-thirds of the Missouri Pacific Railroad's direct single-line rail distance of 992 miles between New Orleans and Kansas City. On the basis of such a formula the Commission could have converted the actual river distances between New Orleans and various river-landing transfer points into constructive rail distances for addition to the rail distances beyond the transfer points to make through distances for comparison with the rail distances beeween Galveston and Houston and the interior western points. These distances are shown in the record. See page 6 of Holloman's Exhibit 1033. (I. C. C. R. 9467)

The Commission in its final report continued arbitrarily to ignore the barge leg of the transportation.

X.

Finding 1 Is Arbitrary.

Finding 1 in the Commission's original report, 270 I. C. C. at 619, R. 51, is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, although the necessity for a limitation on the entire differential system is recognized in principle by the proviso in finding 2. The arbitrariness is thus obvious.

XI.

Administrative Finality.

In the District Court our opponents urged that the Commission's decision was based on a substantial record and that therefore the case was controlled by decisions resting on the doctrine of administrative finality, such as *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, at 536. The court agreed with them. (88 F. Supp. 988. R. 181). That was error. Substantiality has reference to what is in a record, rather than its size. A substantial record is one which contains an adequate array of essential facts of real rate-making value. While this record contains some 16,000 pages of testimony, most of the evidence respecting the level or reasonableness of the rates is cost data, which the Commission violated. About one-fourth of the record is made up of cost data alone. (270 I. C. C. at p. 603. R. 32.) The remainder is mostly valueless generalities, as is evident from a reading of the Commission's reports. The Commission's action was based on a fractional part of the record covering the mere ancillary and subordinate matters, particularly value of the service, which furnished the basis for the discussion under the heading "The Shippers' Interest in Rail-Barge Transportation" in the Commission's report. (270 I. C. C. 606-609. R. 36-39).

This is not an ordinary rate case. It embraces fundamental rights of tremendous public and private consequence. The evidence is lacking with respect to basic and vital matters. Even if it could be said that the Commission acted upon a substantial record, its order is void because it has no rational basis and is the result of an abuse of discretion and disregard of fundamental facts. See *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, at 146. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, at 536. *Chicago Junction* case, 264 U. S. 258, at 265.

The doctrine of administrative finality has its recognized limits, and these limits must be most carefully and jealously guarded by the courts in these days when administrative tribunals in the regulation of public affairs can so easily trespass upon the inherent rights of individuals.

The Texas interests accordingly ask protection at the hands of this court of last resort.

CONCLUSION.

The case should be remanded to the District Court with directions to enjoin the Commission's order and require the Commission to proceed according to the opinion of this court.

Respectfully submitted,

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October 16, 1950.

APPENDIX NO. 1.

Relevant Provisions of the Constitution and Statutes.

THE CONSTITUTION, Article 1, Section 9, Clause 6:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

INLAND WATERWAYS CORPORATION ACT:

SEC. 3(c). 45 Stat. 979, 49 U. S. C. § 153 (c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage in common-carrier service on such rivers.

* * * * * * * * * *

Sec. 3(e). 45 Stat. 978-980. Repealed, effective October 1, 1940, by Sec. 320(e) of the Interstate Commerce Act. (e) Any person, firm or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of this title, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as

provided in paragraph (3) of section 15 of[4] this title, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this[5] section; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: PROVIDED, That if the Inland Waterways Corporation sells or leases its transportation facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall

[4] "the interstate commerce act, as amended" in 1928 act instead of "this title."

[5] "act" in 1928 act instead of "section."

be entitled to a certificate of public convenience and necessity upon making application therefor; and all through traffic arrangements and joint tariffs with rules, regulations, and practices in connection therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating the same as common carriers until changed by order of the commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

THE INTERSTATE COMMERCE ACT:

NATIONAL TRANSPORTATION POLICY [Added September 18, 1940.] [U. S. Code, title 49, notes preceedings secs. 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1. 49 U. S. C. (1) (a)

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

SECTION 1 (5) (a) 49 U. S. C. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 3. (1) 49 U. S. C. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 13. (1) 49 U. S. C. 13 (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint

within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 13. (2) 49 U. S. C. 13 (2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

SEC. 14. 49 U. S. C. (1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

SEC. 15. (1) 15 U. S. C. 15 (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending com-

plaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part of the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 307. (d) 49 U. S. C. 907(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail

rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15.

SEC. 320 (e) Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended (U. S. C. title 49, sec. 153 (e)), is hereby repealed as of October 1, 1940; *Provided, however*, That (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of such subsection (e) shall continue in effect as though issued under the provisions of section 309 of the Interstate Commerce Act, as amended; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of such subsection (e) shall, after the repeal of such subsection (e), be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended.

APPENDIX NO. 2.

Quotations From Testimony Offered by the Texas Interests.

When Witness Holloman was on cross examination by Mr. E. H. Thornton, then General Manager of the New Orleans Joint Traffic Bureau, some questions were asked about the matter of injury to Galveston and Houston interests due to the differential rail-barge rates between New Orleans and the interior West. At page 9514 of the transcript, the following appears:

> Q. I am coming to this claim of injury that you have put up, which was aside from your proposal.
>
> A. Let me explain that a little bit further, since you have brought it up. We fellows who represent the communities and cities and ports cannot deal altogether with and put our thumb on some fellow that is hurt. We deal with the man who wants to establish a business in our community, a distributor who desires to go into the distribution business in our community, a manufacturer who wants to establish a manufacturing plant in our community, an importer who desires to import traffic; and the question of what the rate adjustment by one form or another of transportation, lots of times has the effect of deciding exactly where that man is going to put his industry, establish his business, or go into his importation or exportation business. That is what we are primarily interested in, he may go to New Orleans, and undoubtedly does go to New Orleans, in many instances because he finds a rate adjustment over there that extends him more preferences than he can get in the Texas ports. That is what we are interested in, in one form of the thing, and while I cannot put my finger on a definite movement of 150 pounds of bagging or ties or coffee or some other commodity, it does not mean that we are not hurt. That is the angle we have got to look at in our particular business.

When witness Holloman was on cross examination Mr. C. B. Bee, Special Counsel for the Oklahoma Corporation Commission, also asked him some questions about injury. Let us quote from pages 9530 and 9531 of the transcript:

> Q. All right. Let me ask you another question, Mr. Holloman. Assume a line of goods, such as coffee

that moves from foreign sources of origin, we will say Brazil, to New Orleans, and the same coffee does not move to the Texas ports, it is not available there and it is not purchasable there; now, we must assume from New Orleans to Oklahoma City a rail route to move that coffee—assume that my premise is correct, please—now, would you say that the barge line would not be permitted to make an equalized rate in connection the rail lines from New Orleans to Oklahoma City simply because such rate might disregard Houston where the commodity is not purchasable or obtainable?

A. Yes. For twenty years we have been trying to build up a coffee market in Houston. We have got one or two or three coffee accounts carried there, but we have never been able to get beyond that point by reason of the coffee market out of New Orleans. We have some large coffee roasters in Houston, and we would like to build a coffee market to supply them and the interior but we have never been able to do it because of the competition out of New Orleans, and some of that competition must be the rail rates—not the rail rates, but the transportation rates.

Q. And even though the merchant at Oklahoma City is unable to purchase the class or kind of coffee he wants at Houston and can purchase it at New Orleans, you still think that the barge lines should be prohibited from competing at a cost basis with the rail lines for that service?

A. If the merchant at Oklahoma City will support us, he will pretty soon have a coffee market in Houston, where he can buy all those stocks.

Q. That is your theory?

A. Yes, sir.

Mr. Bee: That is all.

When witness H. B. Cummins of the Houston Port and Traffic Bureau was on the stand he was asked some questions by Examiner Howell and Mr. Bee. We now quote from pages 9567 to 9570 of the transcript:

Examiner Howell: When you show the destinations on 1034, would you say they were actual points of shipment, of each of these commodities?

The Witness: Yes, sir.

Examiner Howell: Would you pick out what you might call principal consuming points?

The Witness: I picked out what I believed to be representative consuming points in this territory, Mr. Examiner. Denver is a destination for coffee; so is Hutchinson, Kansas, Oklahoma City, Shreveport, Wichita, and so on, and Ada, Coffeyville, Oklahoma City, and so on, are destinations for canned goods. As to news print paper, all of the destinations shown have newspapers of large daily circulation and are consuming points for newsprint paper.

Mr. Bee: Do you think Oklahoma City is a destination for sisal?

The Witness: I doubt that Oklahoma City would be, but McAlester would be, and the distance is approximately the same from Houston. The McAlester distance from New Orleans would be somewhat shorter than Oklahoma City.

Examiner Howell: Would you say the newspapers at these particular points named used principally import paper?

The Witness: Mr. Examiner, I could not say that they do use principally import paper, but I do know that large quantities of import paper, and some Swedish paper are imported through the Texas ports, and as well through New Orleans. What proportion of the consumption of newsprint paper at these interior points would be import and what proportion would be produced in the United States, I could not say.

Examiner Howell: Off the record.

(Discussion off the record.)

The Witness: Mr. Examiner, whether or not there has been a movement of any particular commodity by barge to any single destination or to any particular city I am not in position to say, but, representing the Port of Houston, I do want to make this statement, that almost daily we are in contact with distributors, exporters and importers of commodities who are looking for a port location through which to make their distribution to the best possible advantage. Now, considering the fact that New Orleans serves a large area on and east of the Mississippi River, and a consider-

able area west of the Mississippi River, notably in Wisconsin, Minnesota, Missouri, Iowa, Arkansas, and Louisiana, in which territory New Orleans either has rates equal to ours or generally lower than the rates from Houston, we find that on many commodities, such, for example, as coffee, the distribution will be determined by consumption as related to freight rates. For example, there are more coffee drinkers east of the Mississippi River and immediately west thereof than there are in Texas, Oklahoma, Kansas, Colorado, and New Mexico, because of the much denser population.

Considering the fact that New Orleans has a tremendous rate advantage as compared with Texas ports, in all the area on and east of the river and a large part of that west of the river, we have found that equalized rail rates, New Orleans with the Texas ports, in relation to traffic moving to the territory in Texas, Oklahoma, Kansas, Colorado, and New Mexico which we consider naturally tributary to the Texas Ports, determines in many cases where an exporter or importer will locate to do business.

Ordinarily, an exporter or importer does not have to have a considerable investment in storage facilities. They utilize the public storage facilities that are available at the port of destination. Recently we had a representative of a news print paper concern operating in Quebec, some four or five mills, and which concern is going to bring paper into the Gulf and distribute it throughout the Southwestern territory and portions of the Western Trunk Line territory, or they are going to try to—one cargo has already been put into Houston, 4,750 tons. We were successful in getting that particular cargo, even though, taking the Southwestern territory, Western Trunk Line territory, and the territory east, as a whole, New Orleans has an even break in most of the territory and lower rates in the remainder.

Now, if we have equalized railroad rates from New Orleans with the Texas ports, into Texas, Oklahoma, Kansas, Colorado and New Mexico and then superimposed upon that structure a differe ial for this barge-rail traffic, you can readily see that we are automat-

ically at a disadvantage with New Orleans to the extent of that differential.

There were many other questions put to these witnesses on cross-examination, but they generally dealt with rail-barge differentials for New Orleans assumed to be justified by facts, which is not the situation here.

Certificate of Service.

A copy of this brief was served on counsel for all parties of record by first-class mail on this 16th day of Octobe., 1950.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1950

No. [redacted] 47

RAILROAD COMMISSION OF TEXAS,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

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Counsel for Appellant.

WAYNE M. HOFFMAN,
Of Counsel.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT OF THE RAILROAD COMMISSION OF TEXAS AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON DIRECT APPEAL.

The Railroad Commission of Texas, intervening complainant in the above captioned case, having this day presented its petition for direct appeal therein, now files this its statement of the basis upon which they contend that the Supreme Court of the United States has jurisdiction to review the final decree and should exercise such jurisdiction. This is done in conformity with Rule 12 of the Supreme Court of the United States.

Jurisdictional Statutory Provisions and Court Decisions Thereunder

The decree in question was entered by a statutory three judge court specially convoked under and by virtue of the provisions of the Judicial Code, 28 U.S.C. §1336, 1398, 2284 and 2321-2325, inclusive.

The Supreme Court has jurisdiction to review the decree by direct appeal under the Judicial Code, 28 U. S. C. § 1253 and 2101 (b). These provisions represent a consolidation and continuance of the substance of statutory provisions previously in effect, under which appeals were taken in many cases such as the following. *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567; *New York* v. *United States*, 331 U. S. 284; and *Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573.

Statutes Involved in the Merits of the Case

The case involves:

The Interstate Commerce Act, which opens with a declaration of national transportation policy to be followed in the administration of the Act. Among other things, it calls for fair and impartial regulation of all modes of transportation subject to the Act, to recognize and preserve the inherent advantages of each and to avoid unjust discriminations, undue preferences and unfair or destructive competitive practices.

Section 1(1)(a) of the same Act, 49 U. S. C. 1(1)(a), which provides that it applies to traffic moving partly by water and partly by rail as well as to all-rail traffic.

Section 1(5)(a), of the same Act, 49 U. S. C. 1(5)(a), which provides that all charges for transportation must be just and reasonable.

Section 3(1), of the same Act, 49 U. S. C. 3(1), which prohibits undue preference of shippers, localities, ports, etc.

Sections 13(1), of the same Act, 49 U. S. C. 13(1); 13(2), thereof, 49 U. S. C. 13(2); 14(1) thereof, 49 U. S. C.

14(1); and 15(1) thereof, 49 U. S. C. 15(1), which provide the procedure and machinery for investigations, hearings, etc., and for requiring the establishment and maintenance of rates found reasonable as maximum and/or minimum, nonpreferential and otherwise lawful by the Interstate Commerce Commission.

Section 307(d), of the same Act, 49 U. S. C. 907(d), which gives the Commission power to require through routes and reasonable joint rates partly by rail and partly by water, differentially lower than all-rail rates where justification is found.

Section 320(e) of the same Act, which repealed Section 3(e) of the Inland Waterways Corporation Act, as amended by the so-called Denison Act, 45 Stat. 980, but continues in force rates prescribed prior to October 1, 1940, under the Inland Waterways Corporation Act.

Also involved is the Constitution, Article 1, Section 9, Clause 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

The Nature of the Case and the Rulings of the District Court

The case arose out of an order of the Interstate Commerce Commission in its Docket No. 26712, which was an investigation of existing rates for the through transportation of freight partly by rail and partly by barge from and to various points in the greater Mississippi Valley, these rates being differentially lower than the all-rail rates from and to the same points. The main issue was as to whether these rates or possibly others to be prescribed would be reasonable and otherwise lawful for the future. For the most part the existing rates were those established over a period of years in purported conformity with orders of the Commission entered, without hearings, in vari-

ous proceedings under Section 3(e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980. In said Docket No. 26712, entitled *Rail and Barge-Joint Rates*, the Commission issued an original report, 270 I.C.C. 591, dated July 7, 1948, and a supplemental report, 274 I.C.C. 229, dated June 13, 1949. Therein it prescribed a new system of differentials to be deducted from all-rail rates to make barge-rail rates in most of the territory involved and entered an order June 13, 1949, requiring that they be put into effect on or before November 1, 1949.

The Commission, in prescribing and ordering the rates in No. 26712, acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. § 907 (d), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

The railroads contended that the Commission construed this provision as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The record showed that the costs to the carriers were at least as great via rail-barge as via all-rail. The Commission said in its original report that it could not find that there were demonstrable economies in the rail-barge service which would justify differentials and it appeared that the prescription of differentials rests solely

upon the supposed Congressional mandate. The railroads felt that the Commission's construction of the law was in error and in violation of the National Transportation Policy stated in an introductory paragraph of the Interstate Commerce Act, and that the differentials were not "justified" by the evidence. On September 20, 1949, they accordingly instituted this court action, alleging that the Commission's decision was arbitrary, capricious, unconstitutional and otherwise unlawful. Due to the pendency of this proceeding, the Commission postponed the effective date of its order from time to time. It now stands postponed until May 31, 1950. Galveston Chamber of Commerce, Houston Port and Traffic Bureau and the sovereign State of Texas, through the Railroad Commission of Texas, intervened, supporting the railroads and asking similar relief, particularly with respect to rates between New Orleans, La., and interior points west of the Mississippi River. Galveston and Houston are ports of entry and egress for water-borne traffic (export, import, coastwise and intercoastal) handled in competition with New Orleans, which traffic originates, at, or is destined to, interior points west of the Mississippi River. The rail-barge rates which the Commission prescribed between New Orleans and the interior points, in arbitrary disregard of its statement that it could not find demonstrable economies in the rail barge service, would artificially afford competitive advantages for New Orleans' interests, while depriving Houston and Galveston interests of their inherent advantages of location and subjecting them to grave injustice and serious injury. This would be unlawful. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

The intervening complainant above mentioned urged that the Commission was arbitrary in prescribing differential barge-rail rates for New Orleans, resulting in undue preference of New Orleans and undue prejudice to Galveston and Houston interests. in violation of Section 3(1) of the

Interstate Commerce Act, 49 U. S. C. § 3(1); and that such rates would bear an unreasonable relation to the rates between Galveston and Houston, on the one hand, and the interior points on the other, and be below reasonable minima, in violation of Section 1(5)(a) of that Act; also the Commission failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for rail-barge rates. They contended that the Commission's reports and its order lacked findings and conclusions essential to their constitutional and statutory validity, citing cases such as the following: *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504, 510; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488; *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 211.

The intervening complainant urged that Finding 2 of the Commission was arbitrary because the proviso at the end of the finding proceeds to determine barge-rail rates between New Orleans and the interior west by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure. They contended that the cost of the through barge-rail haul with relation to the cost of the all-rail haul should be determinative.

The intervening complainant urged that Finding 1 of the Commission was arbitrary, because it contains no proper proviso for testing certain rates, although the necessity for such is recognized by Finding 2.

Article 1, Section 9, Clause 6, of the Constitution provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. The intervening complainant accordingly urged that if it is correct to construe Section 307 (d) of the Interstate Commerce Act as a mandate for differential rates,

regardless of transportation conditions, that provision of law is unconstitutional because it then means that States having ports served by inland waterways to and from the interior shall be given an artificial advantage over States not having ports served by such waterways. It is understood that the provisions of the Constitution mentioned embraces any description of legislation looking to a direct privilege or preference of the ports of one State over those of another. See *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421.

By prescribing rates not justified by the relative costs, the Commission would violate the National Transportation Policy declared on the opening pages of the Interstate Commerce Act. These rates would be a burden on the economy of the nation and would unlawfully divert traffic from the railroads to the barge-rail routes. The barge-rail carriers with their higher operating costs would have lower rates than the all-rail lines at the expense of the shippers and the public.

The intervening complainant prayed that, upon final hearing of the cause, the Court adjudge that the order of the Interstate Commerce Commission to have been predicated upon an unconstitutional statutory provision, or a misconstruction of the Interstate Commerce Act, unlawful, beyond the power of the Commission, arbitrary, capricious, without rational basis, unsupported by essential findings, and contrary to and without support in the evidence; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation, and execution of said order as to the rates from and to New Orleans, and that interveners have such further relief as might be deemed proper by the Court. It asked that the Commission's case be remanded to the Commission for action respecting the existing rates not inconsistent with the Court's decision.

The Court, specifically deciding some very important points against the intervening complainants, dismissed the case. It is sincerely felt that the Court was wrong in doing so.

Copies of the court's opinion and Findings of Fact and Conclusions of Law appear as Appendixes Nos. 1 and 2 hereto.[1]

Questions of Great Substance and Importance Are Involved

Many new questions of law are presented by this case. The question of whether the Commission misconstrued the differential provision of Section 307 (d) of the Interstate Commerce Act will no doubt affect the barge-rail rate structure for years to come. It is a matter of prime importance, because if barge-rail routes are required to perform wasteful transportation, the public as well as shippers not in position to use such routes will have to foot the bill. It is a matter of prime importance not only to the railroads which would have to give up much of the traffic and revenue to competing forms of transportation, but to Galveston and Houston interests who compete with New Orleans for the heavy traffic from and to the interior points west of the Mississippi River.

For New Orleans to have an advantage over Galveston and Houston regardless of transportation conditions is a very serious matter.

Whether the inferior service of the barge-rail routes is justification for differentials, regardless of the relative cost of service, is a question of far-reaching effect.

The question whether the Commission may test barge-rail rates from and to New Orleans by considering only the

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[1] (Clerk's Note.—The Opinion of the District Court is printed as an appendix to the Statement as to Jurisdiction in the case of *Alabama Great Southern Railroad Co., et al.* v. *United States, et al.*, No. 748, and is not reprinted here.)

rail portion of the through haul is presented. If the Commission correctly construed the differential provision of Section 307(d) as a mandate for differentials regardless of transportation conditions, a grave question of constitutionality affecting Galveston, Houston and the rights of the sovereign State of Texas is involved.

The case is plainly one which affects the national transportation economy, as well as rights of individual shippers, localities and ports. The questions involved are substantial and important.

Respectfully submitted,

PRICE DANIEL,
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CHARLES E. CRENSHAW,
Assistant Attorney General,
Attorneys for Intervening Complainant.

WAYNE M. HOFFMAN,
Of Counsel.

March 10, 1950.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~ 1950

No. ~~251~~ 48

SAVANNAH SUGAR REFINING CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

C. R. HILLYER,
Counsel for Appellant.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT OF SAVANNAH SUGAR REFINING CORPORATION AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, intervening plaintiff, Savannah Sugar Refining Corporation, submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final decree and order of the United States District Court entered herein on January 12, 1950. A petition for appeal is presented to the District Court herewith, to wit, on March 7th, 1950.

Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the final decree and order of the District Court entered in this case is conferred by

Title 28, United States Code, sections 1253, 2101(b), 2284, and 2325, effective September 1, 1948, 62 Stat. 928, 962, 968, 970.

Cases Sustaining Jurisdiction

Interstate Commerce Commission v. *Mechling*, 330 U. S. 567; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282; *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *United States* v. *New York Central R. R.*, 263 U. S. 603.

The case involves:

The Interstate Commerce Act, which opens with a declaration of national transportation policy to be followed in the administration of the act. Among other things, it calls for fair and impartial regulation of all modes of transportation subject to the act, to recognize and preserve the inherent advantages of each and to avoid unjust discriminations, undue preferences and unfair or destructive competitive practices.

Section 1 (1) (a) of the same act, 49 U. S. C. 1 (1) (a), which provides that it applies to traffic moving partly by water and partly by rail as well as to all-rail traffic.

Section 1 (5) (a), of the same act, 49 U. S. C. 1 (5) (a), which provides that all charges for transportation must be just and reasonable.

Section 3 (1), of the same act, 49 U. S. C. 3 (1), which prohibits undue preference of shippers, localities, ports, etc.

Sections 13 (1), of the same act, 49 U. S. C. 13 (1); 13 (2); 49 U. S. C. 13 (2); 14 (1) 49 U. S. C. 14 (1); and 15 (1) 49 U. S. C. 15 (1), which provide the procedure and machinery for investigations, hearings, etc. and for requiring the establishment and maintenance of rates found reasonable as maximum and/or minimum, non-preferential and otherwise lawful by the Interstate Commerce Commission.

Section 307 (d), of the same act, 49 U. S. C. 907 (d), which gives the Commission power to require through routes and reasonable joint rates partly by rail and partly by water, differentially lower than all-rail rates where justification is found.

Section 320 (e) of the same act, which repealed Section 3 (e) of the Inland Waterways Corporation Act, as amended by the so-called Denison Act, 45 Stat. 980, but continues in force rates prescribed prior to October 1, 1940, under the Inland Waterways Corporation Act.

Also involved is the Administrative Procedure Act (5 U. S. C. 1001).

Also involved is the Constitution, Article 1, Section 9, Clause 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.

The Nature of the Case and the Rulings of the District Court

The case arose out of an order of the Interstate Commerce Commission in its Docket No. 26712, which was an investigation of existing rates for the through transportation of freight partly by rail and partly by barge from and to various points reached by barge-rail routes, these rates being differentially lower than the all-rail rates from and to the same points. For the most part the rates were those established over a period of years in purported conformity with orders of the Commission entered, without hearings, in various proceedings under Section 3 (e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980. In the proceeding, entitled *Rail and Barge Joint Rates*, the Commission issued an original report, 270 I. C. C. 591, dated July 7, 1948, and a supplemental report, 274 I. C. C. 229, dated June 13, 1949. Therein it prescribed

a new system of differentials to be deducted from all-rail rates to make barge-rail rates in most of the territory involved and entered an order June 13, 1949, requiring that they be put into effect on or before November 1, 1949.

The Commission, in prescribing and ordering the rates in No. 26712, acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. 907 (d), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

The railroads contended that the Commission construed this provision as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The record showed that the costs to the carriers were at least as great via rail-barge as via all-rail.

The Commission said in its original report that it could not find that there were demonstrable economies in the rail-barge service which would justify differentials and it appeared that the prescription of differentials rests solely upon the supposed Congressional mandate. The railroads felt that the Commission's construction of the law was in error and in violation of the National Transportation Policy stated in an introductory paragraph of the Interstate Commerce Act, and that the differentials were not "justified" by the evidence. On September 20, 1949, they

accordingly instituted this court action, alleging that the Commission's decision was arbitrary, capricious, unconstitutional and otherwise unlawful. Due to the pendency of this proceeding, the Commission postponed the effective date of its order from time to time. It now stands postponed until May 31, 1950.

The Savannah Sugar Refining Corporation intervened before the Interstate Commerce Commission supporting the railroads and asking similar relief, and has been an active party throughout the proceeding before the Commission and before the District Court. It is engaged in the refining of imported and domestic cane sugar at Port Wentworth, Georgia, adjacent to Savannah, Georgia. Its product, refined sugar, is transported by rail in carloads to consuming markets in all of the States of the Southeast, and also to destinations in states North of the Ohio river, covered by the order of the Interstate Commerce Commission here under attack, in competition with the movement of sugar at barge-rail rates from New Orleans.

During the course of the hearings before the Commission the Savannah refinery undertook by testimony and exhibits to show that to competitive markets to which Savannah shipped at rail rates from Savannah, the barge-rail rates from New Orleans should be no lower than the all-rail rates on sugar from New Orleans. That competition in the sale of sugar is exceedingly keen and that in this proceeding the volume of sugar moving from New Orleans via barge-rail routes is of outstanding importance.

That prescription of differentials in favor of joint rail-barge routes which are not justified by demonstrable economies in the rail-barge service gives to shippers of sugar who are in a position to ship via the rail-barge routes, an arbitrary and unfair advantage in reaching competitive markets, over intervener who is not in a position to use

rail-barge service but who does have available all-rail routes over which the traffic can be moved at a lesser cost than over the competing rail-barge routes. Thus shippers who have available to them the lower cost economical all-rail routes are deprived of this inherent advantage by the arbitrary rate differentials.

The all-rail rates on sugar in carloads from the refinery of this intervener located at Port Wentworth, Georgia, and the all-rail rates on sugar in carloads from competing refineries in the New Orleans district, to the markets involved in this proceeding are reasonable and lawful rates in and of themselves; and said all-rail rates from and to said points also have been fairly related the one to the other, and free from unjust discrimination, as required by the Interstate Commerce Act, for the respective transportation services for all-rail transportation. Therefore, arbitrarily lower differential rail-barge rates from the New Orleans District to said competitive markets, which are not justified by demonstrable economies in the rail-barge service or other transportation circumstances and conditions, result in unduly preferential rates to refiners located in the New Orleans district, and unlawful prejudice to this intervener which is forced to pay the higher all-rail rates, in violation of Section 3(1) of the Act to regulate Commerce; and results in relatively unreasonable and unlawful existing relationships between joint barge-rail rates and all-rail rates, and in unreasonably low rates, all in violation of Section 1 of said Act to regulate Commerce.

The decision of the Commission refers to Sugar traffic as of "outstanding importance." Thus, this intervener is the outstanding victim of the existing barge-rail differential rates. In absorbing the difference between the all-rail rates and the differential barge-rail rates, the cost to

intervener on shipments to three Southeastern states alone, up to the time of the hearing before the Commission, amounted to $464,133.00. The Commission states that its decision "shall not affect the present barge-rail rates on sugar." The order of the Commission provides that the reports are a part thereof. While this finding is negative in form it is affirmative in substance, and arbitrarily authorizes the continuation of differential barge-rail rates under a misconception of the provisions of the Transportation Act of 1940, as pointed out elsewhere herein.

New Questions of Great Substance and Importance Are Involved

Many new questions of law are presented by this case. The question of whether the Commission misconstrued the differential provision of Section 307(d) of the Interstate Commerce Act will no doubt affect the barge-rail rate structure for years to come. It is a matter of prime importance, because if barge-rail routes are required to perform wasteful transportation, the public as well as shippers not in position to use such routes will have to foot the bill. It is a matter of prime importance not only to the railroads which would have to give up much of the traffic and revenue to competing forms of transportation, but to the Savannah Sugar Refining Corporation in competition with New Orleans in reaching the markets served by the barge-rail routes.

For the New Orleans refiners to have an advantage over the Savannah refinery regardless of transportation conditions is a very serious matter.

Whether the inferior service of the barge-rail routes is justification for differentials, regardless of the relative cost of service, is a question of far-reaching effect.

The case is plainly one which affects the national transportation economy, as well as rights of individual shippers, localities and ports. The questions involved are substantial and important.

Respectfully submitted,

C. R. HILLYER,
Attorney for Intervening Complainant.

March 7, 1950.

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949.~~ 1950

No. ~~[illegible]~~ 118

SAVANNAH SUGAR REFINING CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT, IN REPLY TO MOTIONS TO AFFIRM.

C. R. HILLYER,
Attorney for the Savannah Sugar Refining Corporation, Appellant.

135 South LaSalle Street,
Chicago (3), Illinois.
April 12, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

SAVANNAH SUGAR REFINING CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT, IN REPLY TO MOTIONS TO AFFIRM.

Certain of the appellees having filed motions to affirm, pursuant to Rule 12, paragraph 3, of the revised Rules of Practice of the Supreme Court of the United States, the Savannah Sugar Refining Corporation submits herewith its brief opposing said motions, pursuant to Rule 7, paragraph 3.

STATEMENT.

This is a direct appeal from the final judgment and decree of a specially constituted court of three judges dismissing the suit of the Alabama Great Southern Railroad Company and other plaintiffs, including the Savannah Sugar Refining Corporation, to set aside an order of the Interstate Commerce Commission. *Alabama Great Southern Railroad Company, et al.* v. *United States of America, et al.*, No. 49 C 1434. Findings of fact, conclusions of law, and the judgment and decree of the court were entered on January 12, 1950, dismissing the complaint. The appeals of the plaintiffs were allowed on March 7, 1950, and appeal papers were served on Chicago counsel on that date.

The Commission's order, dated June 13, 1949, was made in a proceeding docketed as No. 26712. That was an investigation instituted by the Commission on its own motion into and concerning the reasonableness and lawfulness otherwise of existing differential through routes and joint rates between the barge lines and their rail connections, and for the purpose of determining and establishing such additional reasonable through routes and differentials as might be justified for barge-rail service. *Rail and Barge Joint Rates*, 270 I. C. C. 591.

The Savannah Sugar Refining Corporation, appellant, a party throughout the proceedings before the Commission and the Court, is engaged in the refining of imported and domestic cane sugar at Port Wentworth, Georgia, adjacent to Savannah, Georgia. Its product, refined sugar, is transported via all-rail routes in carloads to consuming markets in all of the states of the southeast, and also to destinations in states north of the Ohio River, covered by the order here under attack.

POSITION OF THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT.

Said competitive destination region is served by the Savannah refinery at all-rail rates, whereas the competing refiners located in the New Orleans district reach these markets by lower barge-rail differential rates. The position of the Savannah refinery throughout this proceeding has been and is that under Section 3 of the Act to Regulate Commerce prohibiting undue preference and undue prejudice, the barge-rail rates on sugar from New Orleans to competitive markets should be no lower than the corresponding all-rail rates from New Orleans, with which latter rates the rail rates from Savannah have been lawfully related under Section 3 of the Act.

The decision of the Commission describes sugar as of "outstanding importance" in this case. This is supported by the record showing important tonnage of sugar moving from the New Orleans district on the low differential rates, in direct competition with the all-rail tonnage of intervener moving from Savannah to competitive markets via all-rail routes upon which is assessed the higher all-rail rates. The Savannah refinery is the outstanding victim of the existing differential barge-rail rates enjoyed by its competitors.

In prescribing "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water" under Section 307(d) of the Act, the requirements of Section 3 of the Act cannot be ignored for the benefit of one competitor over another, or set aside in a conflict between rail and water carriers.

APPELLANT SEEKS THE ENFORCEMENT OF SECTION 3 OF THE STATUTE.

There was presented to the Court the issue of undue prejudice to the Savannah refinery and the unjust preference to its competitors, in violation of Section 3 of the Act to Regulate Commerce, resulting from the payment by the appellant of the rail rates and the payment by its competitors of the lower barge-rail rates.

That Section 3 of the Act may be said to be its most important provision is recognized by the Supreme Court in many decisions. Both the Commission and the Courts have demanded that Section 3 of the Act be broadly construed and strictly enforced.

> "It was chiefly because of discriminations in freight rates that the Commission was originally established. Section 3 lies at the heart of the Act. It (Section 3) is stated in very broad terms and it should be broadly construed and strictly enforced." (172 I. C. C. 319, 336.)

The Supreme Court has always placed Section 3 of the Act in a position of outstanding importance. Mr. Justice Harlan:

> "The purpose of congress was to cut up by the roots every form of discrimination, favoritism, and inequality." (*Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 478, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265.)

Mr. Justice White:

> "It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism." (*New York, New Haven & Hartford R. Co.* v. *I. C. C.*, 200 U. S. 361, 391.)

In seeking the enforcement of Section 3 of the Act which

is described by the Supreme Court as stated "in very broad terms", and "should be broadly construed and strictly enforced", this Appellant, in this contest between rail and water carriers, is well within its rights as found by this Court in *Penn. R. Co. v. U. S.*, 323 U. S. 588. It was there contended by the railroads that the power of the Commission to fix joint through routes in the "public interest" meant the general public and not an individual shipper. The Supreme Court there held that "public interest" as employed in the Act includes the interest of one single complainant seeking enforcement of any section of the Act. Upon this well-ascertained determination, Appellant is here seeking the "equality of rates" that Mr. Justice White states that we are entitled to under Section 3 of the Act and which Section the Commission's Examiner finds on this record is violated by the existing barge-rail rates on the Warrior River.

The decision of the Court, and also the motions to affirm, rely upon their misstatement that we are seeking to deprive our competitors of the advantage of location upon the river. The palpable error of this assertion is answered hereinafter.

This reply is confined to the effect of the Court's decision and the motions to affirm upon the interstate traffic of this appellant, leaving to the reply of the railroads the other features of the case. In the conflict between the water and rail carriers, the rights of a shipper cannot be set aside under the expressed provisions of the statute, enacted primarily for the protection of shippers in interstate commerce, as held by the Supreme Court in the decision above cited.

POINTS COVERED.

Following the plan hereinbefore outlined, our reply will undertake to show:

1. That the Court and also the motions to affirm misstate the position of this appellant.

2. That the value of barge-rail service in the transportation of sugar is as great as the value of rail service, due to the commercial advantages in the sale and distribution of sugar via barge routes.

3. That the service on the Warrior River has always operated at a heavy financial loss and all hope of successful operation has been abandoned, as found by the Examiner of the Commission and admitted by the Federal Barge line.

4. That the absorption by the barge line of the barge-rail differential creates a violation of Section 3 of the Act against this appellant.

5. That the argument in the motions to affirm that the cost of service record was stale demonstrates that the case was decided without a full hearing.

BRIEF.

I.

Both the decision of the Court and the motions to affirm, in so far as the interest of this appellant in this case is concerned, palpably and without excuse misstate our position. We have repeatedly, upon brief and oral argument, defined our status in this case in which we are striving to protect our right to equal rates with our competitors justified by the inherent advantage of lower cost rail transport. It is therefore a flagrant misstatement to assert that we are seeking to take away from our competitors the advantage of their location upon the Mississippi River. (Sheet 3 of Court's decision.) Nothing could be further from the truth. Under the law such natural advantage cannot be set aside. These carriers are all chartered to serve the public, not each other, and the public includes this appellant.

No one is objecting to giving the New Orleans refiners the benefit of their location. If they have any natural advantages they are entitled to them under the law. What we are objecting to is the extension to these large New Orleans refiners of "unnatural" advantages at the expense of ourselves and others. There is no "public policy" that does or can support such an evil theory of transportation.

II.

The motions to affirm are based in part upon the assertion that even if the barge-rail service is rendered at a higher cost than the rail service, the lower differential rates are justified because of the lower value of the barge-rail service. This assumption is not true as to the barge-rail

service on sugar, and with respect to the traffic of this appellant this defense wholly fails.

The decided advantage of barge-rail service over rail service in the transportation of sugar is conclusively conceded by the testimony of witnesses representing the New Orleans refiners who use the service extensively. It is also testified to by the officials of the Federal Barge line.

III.

The unlawfulness of the barge-rail rates via the Warrior River was found by the Examiner of the Commission. This service reaches right into the heart of the southeast in direct competition with the Savannah refinery. The Examiner finds that "clearly they (barge lines) have no hope of putting the Warrior service on a paying basis". In other words, he finds that this service is rendered at less than cost, and that the Federal Barge line concedes that it can never be otherwise.

The Examiner recognizing the unlawfulness of the existing differential in rates states that if the barge line "performed service at less than cost, it would be guilty of an unfair and destructive practice which might call for the exercise of the Commission's restraining powers." (Sheet 30.) The Examiner then states that "clearly they (the barge lines) have no hope of putting the Warrior service on a paying basis."

The record shows that the upstream tonnage on the Warrior has been principally sugar from the New Orleans district, moving right into the heart of the district that the Savannah refinery was constructed to serve, at preferential barge-rail rates lower than the cost of service. Appellant has been forced to absorb the differential between the all-rail rates and the barge-rail rates in the sum of

$464,133.00, up to the time of the hearing on tonnage in three states alone, every penny of which has been an unlawful exaction in violation of law, duly found upon the record by the Examiner.

IV.

The Motions to Affirm rely upon the statement by the Court that "in the joint rates established the railroads retain their regular rates; the differential between the all-rail rates and the barge-rail rates is absorbed by the barge lines". (Sheet 9.) The argument of the Court is that the railroads therefore will not be hurt when forced to join in the lower differential barge-rail rates. The fallacy of this theory is answered fully in the reply of the railroads, but the disingenuousness of this claim when applied to the competitive rates on sugar stands out. Regardless of how these carriers may divide up the joint rate between them, the unlawful discrimination against this appellant continues in full force.

V.

The motions to affirm assert that the cost of service evidence is "worthless" because among other things it is "stale". The staleness, if true, is due solely to the procrastination of the Commission in deciding the case years after it was submitted. To arbitrarily set aside one-fourth of the immense record prepared at great expense by highly competent and skillful experts for the reasons offered savors of extremely arbitrary action. Under the condition thus presented the proper procedure was to set the case down for further hearing and bring the record down to date. To do otherwise results in depriving the parties of their statutory right to a full hearing under the Act. The

Supreme Court has held that an order cannot lawfully rest upon a stale record. *Atchison, Topeka & Santa Fe* v. *U. S.*, 284 U. S. 248.

Conclusion.

The opening paragraph of the statute setting forth the National Transportation Policy requires "fair and impartial regulation of all forms of transportation, *without unfair destructive competitive practices.*" (Italics supplied.)

It is apparent from the foregoing pages that this appeal presents issues extremely vital to this appellant. That due to the misapprehension of the Court as shown by its misstatement of our position; the admissions against interest of our opponents; and the findings of the Commission's Examiner as to unlawful operation on the Warrior River; the lack of evidence in support of the prescribed commodity rates, as found by the Commission's Examiner; the motions to affirm rest upon a misconception of the law and a misapprehension of the facts. For these reasons and for others set forth in this reply, it is requested that the motions to affirm be denied.

Respectfully submitted,

C. R. Hillyer,
Attorney for the Savannah Sugar Refining Corporation, Appellant.
135 South LaSalle Street,
Chicago (3), Illinois.

April 12, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 48*

SAVANNAH SUGAR REFINING CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT IN NO. 48.

C. R. HILLYER,
Counsel for Appellant.

October 16, 1950.

* Together with No. 45, *Alabama Great Southern Railroad Company, et al., Appellants* v. *United States, et al.*; No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*; No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al.*, also on appeals from the same Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 48.*

SAVANNAH SUGAR REFINING CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT IN NO. 48.

OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (R. 173-184) is reported at 88 F. Supp. 982.

The report and supplemental report of the Interstate Commerce Commission (R. 16-74, 75-77) are reported at 270 I. C. C. 591 and 274 I. C. C. 229.

* Together with No. 45, *Alabama Great Southern Railroad Company, et al., Appellants* v. *United States, et al.*; No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*; No. 47 *Railroad Commission of Texas, Appellant* v. *United States, et al.*, also on appeals from the same Court.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. Code §§ 1253 and 2101(b), 62 Stat. 928, 962. The final decree of the District Court (R. 189-190) was entered January 12, 1950. The petition for appeal (R. 203) was filed and the order allowing appeal (R. 207) was entered on March 7, 1950. Probable jurisdiction was noted by this Court on May 15, 1950 (R. 460).

QUESTIONS PRESENTED.

1. Whether § 307(d) of the Interstate Commerce Act is a congressional mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

2. Whether the Commission may deprive appellant of its inherent advantage of lower cost rail service by establishing differentials where the barge-rail service in the transportation of sugar for appellant's competitors is not supported by demonstrable economies.

3. Whether the Commission may establish joint barge-rail rates without finding that such rates are just and reasonable.

STATUTES INVOLVED.

This appeal involves the interpretation of the following statutory provisions:

Section 307(d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907(d)], which reads in part as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The national transportation policy, 54 Stat. 899, which precedes section 1 of the Interstate Commerce Act [49 U. S. C. § 1], and which reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to co-

operate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 3(c) of the Inland Waterways Corporation Act, as amended by section 2 of the Denison Act, 45 Stat. 979 [49 U. S. C. § 153(c)], which reads in part as follows:

"It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . ."

Sec. 1(5)(a) [49 U. S. C. § 1(5)(a).] All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Sec. 3(1) [49 U. S. C. § 3(1).] It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit

point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

STATEMENT OF THE CASE.

The Savannah Sugar Refining Corporation (referred to hereinafter as Savannah Refinery) is engaged in the refining of imported and domestic cane sugar at Port Wentworth, Georgia, adjacent to Savannah, Georgia. Its product, refined sugar, is transported by all-rail routes in carloads to consuming markets in all the states of the southeast and also to destinations in states north of the Ohio River, covered by the decision of the Commission here under attack. Savannah was a party in interest in the case before the Commission out of which this court action arose.

The case arose out of an order of the Interstate Commerce Commission in its Docket No. 26712, which was an investigation into the reasonableness and lawfulness of existing rates for the through transportation of freight partly by rail and partly by barge from and to various points reached by barge-rail routes, these rates being differentially lower than the all-rail rates from and to the same points. For the most part the rates were those established over a period of years in purported conformity with orders of the Commission entered, without hearings, in various proceedings under Section 3 (e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980. In said docket No. 26712, entitled *Rail and Barge Joint Rates,* the Commission issued an original

report, 270 I. C. C. 591, dated July 7, 1948, and a supplemental report, 274 I. C. C. 229, dated June 13, 1949. Therein it prescribed a new system of differentials to be deducted from all-rail rates to make barge-rail rates in most of the territory involved and entered an order June 13, 1949, requiring that they be put into effect (R. 14).

The Commission, in prescribing and ordering the rates in No. 26712, acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. 907 (d), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

The railroads contended that the Commission construed this provision as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The evidence offered by the Commission's cost witness showed that the cost of rail-barge transportation was from 16 to 46 per cent greater than the corresponding all-rail service, depending upon which method of computing costs was used as basis for comparison. (Exhibit 1 before the District Court, Exhibit 1350 before the Commission.)

The Commission said in its original report that it could not find that there were demonstrable economies in the rail-barge service which would justify differentials and it appeared that the prescription of differentials rests solely

upon the supposed Congressional mandate. The railroads felt that the Commission's construction of the law was in error and in violation of the National Transportation Policy stated in an introductory paragraph of the Interstate Commerce Act, and that the differentials were not "justified" by the evidence. On September 20, 1949, they accordingly instituted this court action, alleging that the Commission's decision was abritrary, capricious, unconstitutional and otherwise unlawful.

The Savannah Sugar Refining Corporation intervened before the Interstate Commerce Commission supporting the railroads and asking similar relief, and has been an active party throughout the proceeding before the Commission and before the District Court.

During the course of the hearings before the Commission the Savannah refinery undertook by testimony and exhibits to show that to competitive markets to which Savannah shipped at rail rates from Savannah, the barge-rail rates from New Orleans should be no lower than the all-rail rates on sugar from New Orleans. That competition in the sale of sugar is exceedingly keen and that in this proceeding the volume of sugar moving from New Orleans via barge-rail routes is of outstanding importance.

That the prescription of differentials in favor of joint rail-barge routes which are not justified by demonstrable economies in the rail-barge service gives to shippers of sugar who are in a position to ship via the rail-barge routes, an arbitrary and unfair advantage in reaching competitive markets, over plaintiff which is not in a position to use rail-barge service but who does have available all-rail routes over which the traffic can be moved at a lesser cost than over the competing rail-barge routes. Thus appellant which has available to it the lower cost economical all-rail routes is deprived of this inherent advantage by the arbitrary rate differentials.

The all-rail rates on sugar in carloads from the refinery of this intervener located at Port Wentworth, Georgia, and the all-rail rates on sugar in carloads from competing refineries in the New Orleans district, to the markets involved in this proceeding are reasonable and lawful rates in and of themselves; and said all-rail rates from and to said points also have been fairly related the one to the other, and free from unjust discrimination, as required by the Interstate Commerce Act, for the respective transportation services for all-rail transportation. Therefore, arbitrarily lower differential rail-barge rates from the New Orleans District to said competitive markets, which are not justified by demonstrable economies in the rail-barge service or other transportation circumstances and conditions, result in unduly preferential rates to refiners located in the New Orleans district, and unlawful prejudice to appellant which is forced to pay the higher all-rail rates, in violation of Section 3(1) of the Act to regulate Commerce; and results in relatively unreasonable and unlawful existing relationships between joint barge-rail rates and all-rail rates, and in unreasonably low rates, all in violation of Section 1 of said Act to regulate Commerce.

SPECIFICATION OF ERRORS.

Appellant relies upon all the errors assigned in its Assignment of Errors (R. 204). The basic errors of the District Court, however, may be summarized as follows:

1. The Court erred in failing to set aside the order of the Commission on the ground that the establishment of differentials in favor of the barge-rail service, without a finding that the service costs less to perform than all-rail service, deprives appellant of its inherent advantages of lower cost of service in violation of the national transportation policy.

2. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's finding that differentials between all-rail rates and joint barge-rail rates are justified is inconsistent with, unsupported by, and contrary to its finding that it could not find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries which, from the standpoint of cost of service, would justify differentials.

3. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's order was based upon a misconstruction of the Interstate Commerce Act and the national transportation policy.

4. The Court erred in failing to set aside the order of the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are just and reasonable and in the absence of preliminary and subsidiary findings of fact on which such an ultimate finding could rationally be based.

5. The Court erred in failing to set aside the order of

the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are not unduly preferential of the New Orleans refiners and unjustly prejudicial of the Savannah refinery.

6. The Court erred in failing to find that it is not in accord with the national transportation policy to discriminate against all-rail shippers by depriving them of their inherent advantages of low-cost economical rail service.

7. The Court erred in failing to find that the "experiment" on the Warrior River, which especially hurts this appellant, is conceded to have been a hopeless failure since its inception many years ago, and that there is no claim made by any one that future experience will alter this status.

SUMMARY OF ARGUMENT.

In summarizing the argument, it is important to note at the outset the order of the Commission instituting Docket No. 26712 (R. 78). The Commission on its own motion there undertook to investigate and determine "the reasonableness and lawfulness otherwise of existing through routes and joint rates," * * * with the view to making such findings in the premises and prescribing such just, reasonable, and otherwise lawful joint rates, rules, regulations, and practices and such reasonable minimum differentials, if any, as the facts and circumstances shall appear to require."

Section 307 (d) of the Act is printed hereinbefore under "Statutes Involved." It provides in part as follows:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The Commission proceeded for years in carrying out the purposes of its order under the above section of the Act.

The Savannah Refinery accepted the issues thus raised in good faith and undertook to show upon the record the unlawful and discriminatory effect of the existing barge-rail rates from the New Orleans refineries in competition with the Savannah Refinery paying rail rates.

The existing barge-rail rates referred to in the order in No. 26712 were assumed to be justified by lower costs of service. After reciting the history of the "experiment," the Commission found:

"In the face of these facts, we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials (R. 36).

After reciting further history of the "experiment" the Commission finds that:

"Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified" (R. 44).

In making the above finding the Commission in effect abandoned its order in No. 26712 and the record made thereunder with respect to the lawfulness and reasonableness of existing differential rates under the substantive provision of the Act. Its finding is based upon what the Commission conceives to be the general congressional policy towards the "experiment."

It is well established by decisions of this Court that orders of the Commission must be based upon the sub-

stantive Transportation standards of the Interstate Commerce Act rather than upon mere general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. *United States* v. *New York Central R. R.*, 263 U. S. 603. In each of these cases, the Court set aside an order of the Commission which had the same defect as the order here involved.

In addition to the misconstruction of the Interstate Commerce Act as above set forth, this appellant especially invites the attention of the Court to its lawful right, under the national transportation policy, to rates that are free from undue prejudice to one shipper and unjust preference of another, in violation of Section 3 (1) of the Act. Sugar moves in volume in interstate commerce and is so highly competitive that the cost of transportation determines the sale. The rates therefore must be lawfully, fairly and reasonably adjusted as required by the Act.

The existing barge-rail rates are in violation of Section 3 (1) of the Act in that they are not supported by any demonstrable economies of service as the Commission has found, and in that they unlawfully deprive the Savannah Refinery of its inherent advantages of low cost economical rail transportation.

ARGUMENT.

THE COMMISSION AND THE DISTRICT COURT FAIL TO COMPLY WITH THE ORDER INSTITUTING THIS INVESTIGATION.

Before the Commission the Savannah refinery assailed the existing differential rates on sugar from New Orleans, and sought a finding that said rates should be on no lower basis than the corresponding basis of all-rail rates on sugar from New Orleans in the total absence of demonstrable economies justifying differential rates. This brief will deal primarily with the subjects set forth in appellant's complaint, namely the arbitrary and unlawful effect of differential rates from New Orleans upon the Savannah refinery shipping sugar in competition therewith upon all-rail rates.

The Savannah Sugar Refining Corporation, a so-called dry-land or all-rail shipper of sugar, is here seeking the enforcement of Section 1(5) of the Act to regulate commerce that interstate rates of transportation shall be just and reasonable; and Section 3(1) of said Act that rates shall be free from undue prejudice and unjust preference. With respect to these two sections, Mr. Justice White has stated that "It cannot be challenged that the great purpose of the Act" is contained in these two Sections. (*New York, New Haven & Hartford R. R. Co.* v. *I. C. C.*, 200 U. S. 361, 391.)

In line with the foregoing principles that stand first and foremost in the proper administration of the Act, the order of the Commission instituting this investigation, No. 26712, states that it was for the purpose of determining "the reasonableness and lawfulness" of "existing

through routes and joint rates" via the rail and water carriers, operating upon the Mississippi and Warrior rivers, and also "the reasonableness of existing differentials between all-rail rates and corresponding barge-rail rates and the fixing of reasonable minimum differentials, *if any*," between the all-rail rates and the barge-rail rates. (Italics supplied.) (R. 14.)

Moreover, Section 307 (d) also undertakes to safeguard the rights of this appellant.

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water * * *"

With the foregoing statement of the position of appellant, and the Sections of the Act, and the order of the Commission instituting this proceeding justifying said position of appellant, the Court's attention is invited to the utter abandonment by the Commission of everything it set out to accomplish in this case, and the substitution therefor of a decision based upon general expressions of Congressional policy rather than upon the substantive provisions of the Act. The Commission did not even purport to test the reasonableness and lawfulness of the rates and differentials which it prescribed by any substantive provisions of the Act. It made no attempt to base its order on evidence before it. It simply regards the policy of Congress as requiring differentials regardless of any transportation circumstances and conditions, and regardless of the unlawful effect of such action upon shippers by rail.

In other words the decisions of the Commission and the Court have repealed for this case the substantive sections

of the Act, (Sections 1(5) and 3(1)) as effectively as if they never existed.

That Section 3 of the Act may be said to be the most important provision as recognized by the Supreme Court in many decisions. Both the Commission and the Courts have demanded that Section 3 of the Act be broadly construed and strictly enforced.

> "It was chiefly because of discriminations in freight rates that the Commission was originally established. Section 3 lies at the heart of the Act. It (Section 3) is stated in very broad terms and it should be broadly construed and strictly enforced." (*Barrett* v. *A. T. & S. F.*, 172 I. C. C. 319, 336.)

The Supreme Court has always placed Section 3 of the Act in a position of outstanding importance. Mr. Justice Harlan:

> "The purpose of congress was to cutup by the roots every form of discrimination, favoritism, and inequality." (*Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 478.)

Mr. Justice White:

> "It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism." (*New York, New Haven & Hartford, R. Co.* v. *I. C. C.*, 200 U. S. 361, 391.)

At no place in its discussion of the justification for differentials does the Commission refer to any of the rate-making provisions of the Interstate Commerce Act, nor is any attempt made to pass upon the reasonableness or lawfulness otherwise of the joint rates and differentials from

the standpoint of any transportation circumstances and conditions. The discussion of the justification for differentials was concluded by the Commission with the following ultimate findings, 270 I. C. C. at 613 (R. 44):

> "Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified."

The Commission began this proceeding by its order in No. 26712 in 1934 to determine lawful, reasonable, and non-discriminatory differential barge-rail rates under Sections 1 and 3 of the Act based upon transportation conditions. But the Commission did not follow through. After completing the investigation through the years with a voluminous record which refuted the myth of cheap barge-rail transportation, the Commission abandoned the purposes of its order of 1934 and the record made thereunder, and switched its decision to carrying out of a policy of fixing lower differential rates regardless of transportation factors developed in the record before it, as admitted in its decision. (R. 44.)

THE COMMISSION MISCONSTRUED THE LAW IN SETTING ASIDE THE SUBSTANTIVE PROVISIONS OF THE ACT.

Section 307 (d) of the Act (*supra*, p. 3) contains the authority of law here to be administered. The Commission is there authorized to fix such reasonable differentials as may be justified by the facts of record. In *Inland Waterways Corp.* v. *A. G. S. R. Co.*, 151 I. C. C. 126 (44) it is held that:

> "The barge-line differentials are based upon the

> premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

Heretofore, no one has questioned the above well-ascertained principle upon which this proceeding should turn. In fact, this guiding principle has been restated by all parties from time to time throughout the pendency of this proceeding. For example, we find on page 15847 of the reopened hearing (Exhibit 1 before the District Court) the following unchallenged statement by the Examiner:

> "You (the barge-line) have admitted that if there is no saving in transportation (costs) through the use of the Federal Barge Line, that the Federal Barge Line has no place in the picture."

As stated hereinbefore this entire proceeding before the Commission from its inception rested upon the well-accepted principle of relative costs of performing the transportation service. Thousands of pages of testimony and scores of elaborate schedules of cost formulae and studies from highly qualified specialists were offered by both sides. Through the years the proceeding was continued from time to time for months to permit the completion of this definitely controlling evidence, upon the result of which it was conceded by all parties the conclusion of the Commission upon the main issue, the reasonable differential between the all-rail and the barge-rail rates, would finally be determined. It was only after the record disposed of the myth of cheap barge-rail transportation that this switch to Congressional policy was made.

Appellant invites the Court's attention to the limitations placed upon the Commission in defining the policy of Congress (*supra*, p. 4). It is there stated that in carrying out the policy of Congress, all charges thereunder shall be "without unjust discriminations, undue preferences or advantages or unfair destructive competitive practices." Moreover, said section concludes as follows:

> "All the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy."

This Court in the *Ann Arbor* case said:

> "The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it.
>
> * * * * *
>
> "We are of opinion that the Commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law." 281 U. S. at 665-6, 668.

EFFECT OF EXISTING UNLAWFUL RATES OF INTERSTATE TRANSPORTATION UPON THE OPERATIONS OF APPELLANT.

The Commission having declined to administer the Act in accordance with its order instituting No. 26712, and the substantive provisions of the Act, we now invite the Court's attention to the unlawful effect of such action upon this appellant.

The vital importance of a lawfully adjusted rate re-

lationship in the transportation of sugar is set forth in the following decision, among others:

> "It is the common practice of jobbers and manufacturers to make allowances in prices, and thus reduce their profits, where necessary to meet the price of competitors enjoying freight rates on lower bases. A shipper's enforced absorption of an unjustified difference in freight rates in the sale of his products results in undue prejudice to him. The undue prejudice is more pronounced when a rate maladjustment precludes him from doing business in which he might engage if rates were equitably related." (*Consolidated Southwestern Cases*, 123 I. C. C. 211.)

Competition in the sale of sugar is extremely sharp and the rate of transportation controls the sale. During the course of the hearing before the Commission there was received testimony pertaining to the extreme keenness of competition always present in the marketing of sugar. This testimony was in part from the president of this appellant. It is there pointed out that sugar is sold on the basis of the lowest rate on sugar to a given market from any refinery. That a refinery having a higher rate, in order to compete, must absorb the difference in the rate. That at the time of this testimony this appellant had thus absorbed on sales of sugar in the State of Alabama $169,326; on sales in the State of Tennessee intervener had thus absorbed $143,942; and on sales in the State of Kentucky $150,864; or a total absorption of $464,133 in these three states alone. (Exhibit 1, before the District Court, pp. 14184-14196.) These absorptions are only a portion of the total absorptions, but are illustrative of the extreme burden forced upon appellant by barge-rail rates which are permitted to continue by the decision of the Commission.

The all-rail rates on sugar in carloads from the Savannah refinery and the all-rail rates on sugar in carloads from competing refineries in the New Orleans district, to

the markets involved in this proceeding, have all been determined as just, reasonable and lawful rates in and of themselves; and said all-rail rates from and to said points also have been fairly related the one to the other, free from unjust discrimination, as required by the Interstate Commerce Act, for the respective transportation services for all-rail transportation. Therefore, arbitrarily lower differential rail-barge rates from the New Orleans district to said competitive markets, which are not justified by demonstrable economies in the rail-barge service, or other transportation circumstances and conditions, result in unduly preferential rates to refiners located in the New Orleans district, and unlawful prejudice to this appellant in violation of Section 1 and Section 3 (1) of the Act, in that the Savannah Refinery is unlawfully deprived of its inherent advantages of low-cost rail transport.

THE COMMISSION SPECIFICALLY DECLINED TO PROTECT THE INHERENT ADVANTAGES OF APPELLANT.

The decision of the Commission describes sugar as of outstanding importance to the barge lines. The record shows important tonnage of sugar moving from the New Orleans district by barge. A heavy percentage of this movement is on port to port rates not involved in this case, and therefore would not be affected by a proper adjustment of the barge-rail rates which are involved herein. The movement upon the barge-rail rates in competition with Savannah, in the absence of any demonstrable economies, deprives Savannah of its inherent advantages of low-cost rail transport and makes Savannah the outstanding victim of the existing differential rates.

On the facts thus submitted, appellant requested the Commission to find that there was no factual basis for the existing differential rates on sugar and that said rates were in plain violation of Sections 1 and 3 of the Act.

The existing differential rates on sugar are merely temporary, awaiting the outcome of this proceeding as to their lawfulness. The Commission's order instituting this proceeding raised the issue as to the lawfulness of "existing differentials." The decision of the Commission enters no finding whatever on this main issue, although the Savannah Refinery requested such finding and supported it with ample testimony and exhibits, showing undue preference of New Orleans and unjust prejudice of Savannah in violation of Section 3 of the Act. The Commission unlawfully withheld corrective action.

The decision of the Commission states with reference to the commodity sugar that a large amount of evidence concerning sugar rates was presented in this proceeding. "That the barge and rail rates on sugar have a vital relation to the general competitive rate relationships in sugar from all producing points to midwestern consuming points, and we consider it highly desirable that no change in sugar rates be made as a result of our findings here". (P. 617.)

This finding is "negative in form but affirmative in substance" as the Supreme Court stated in the case cited below. This finding arbitrarily authorizes the continuation of the unjustified barge rail rates on sugar from New Orleans. The order of the Commission makes the report a part thereof.

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142, the Supreme Court said that an order of the Commission (and the order makes the findings a part thereof), dismissing a complaint on the merits and maintaining the status quo is a well-ascertained exercise of administrative function, no more and no less, than an order directing some change in status. See also *Schenly Corp.* v. *United States*, 326 U. S. 432 and *El Dorado Oil Works* v. *United States*, 328 U. S. 12.

Interstate Commerce Commission v. *Mechling*, 330 U. S.

567, established the principle for which Savannah is contending, namely that the lower cost of barge operation shown in that case, contrary to the showing in the instant case, was an inherent advantage that the Commission had no discretion to take away. In that case this court said at page 579:

> "It is therefore not within the province of the Commission to adjust rates, either to equalize transportation cost of barge shippers with that of shippers who do not have access to barge service, or to protect the traffic of railroads from barge competition."

The "fair and impartial regulation" called for by the national transportation policy demands that the rule of the *Mechling* case be applied impartially and that it protect the inherent advantages of shippers by rail to the same extent that it protects the shippers by barge. This, the Commission refused to do when it specifically declined to administer Sections 1(5) and 3(1) of the act in this case as its order in No. 26712 and the record made thereunder contemplated.

The Court erred in accepting the Commission's finding that no changes in the present barge-rail rates on sugar shall result from its decision, when the main purpose if not the only purpose of its order instituting this proceeding was to give relief from the existing unlawful barge-rail rates. There is no finding whatever as to the lawfulness or the reasonableness of the present barge-rail rates on sugar. On the contrary, the Commissioner writing the decision describes these differential barge-rail rates prescribed as "more or less arbitrary." (270 I. C. C. 591, 620.)

And this Court, in the *Mechling* case, *supra*, 574, in referring specifically to section 307 (d), said:

> "But the congressional debates and committee reports on the 1940 Act and the statutory provisions

> which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates."

The national transportation policy states that all provisions of the Act are to be administered and enforced with a view to carrying out the declaration of policy. Differentials are justified and reasonable only to the extent that they accord to all modes of transportation "fair and impartial regulation * * * so administered as to recognize and preserve the inherent advantages of each." 54 Stat. 899.

THERE ARE NO DISABILITIES IN BARGE SERVICE IN THE TRANSPORTATION OF SUGAR.

The only reason heretofore recognized for a lower barge-rail rate is the claim that the service costs less and at the same time is worth less. (R. 177.) These two facts both must be shown of record and found to exist by the Commission. During the course of the hearings before the Commission there was received in evidence testimony pertaining to the peculiar value of the barge service in the transportation of sugar. This testimony was in part from the witnesses representing the competing New Orleans refiners, and also from an officer of the Federal Barge Line. It is there pointed out that the slower movement by barge is eagerly sought for and used by the New Orleans refiners as it affords free storage pending sale, nets heavy profits on a rising sugar market, and incurs no loss to the purchaser on a declining market due to the Commercial customs pertaining to the sale of sugar. (Ex-

hibit 1 before the District Court pp. 14184-14206; Exhibit 1252, p. 14166.)

The higher cost of service in transporting sugar via barge-rail routes, coupled with the greater value of the barge-rail service in the transportation of sugar by barge, render the lower barge-rail rates from New Orleans unlawful and discriminatory against appellant, in violation of Section 3 (1) of the Act. So far as sugar traffic is concerned, the only recognized basis for differential barge-rail rates, namely that the service costs less and is worth less, does not exist.

THE DISTRICT COURT PALPABLY MISSTATES THE POSITION OF THE SAVANNAH REFINERY.

The Court erred in stating that the Savannah Refinery was seeking to deprive its competitors of the advantage of location on the river. (R. 183.) Nothing could be further from the truth. There is not a line of evidence to support it, and our position throughout the proceeding has been and is that anyone having natural advantages of location are entitled to them. The Savannah Refinery is here seeking to protect its right to the inherent advantage of lower-cost rail transport so found upon the record by the Commission. (R. 36.) No one is objecting to giving the New Orleans refiners the benefit of their location on the river. If th y have any such natural advantages they are entitled to them under the law.

These carriers, rail and water, are chartered to serve the public, not each other, at reasonable and non-discriminating rates. Government subsidies maintain for our competitors a transportation service at the expense of ourselves and other taxpayers. Additionally, the Commission here proposes to grant them the unnatural advantage of lower barge-rail differential rates even though

it finds that there are no demonstrable economies to justify such rates. There is no public policy that does or can support such an evil theory of transportation.

THE "EXPERIMENT" ON THE WARRIOR RIVER HAS BEEN OPERATING AS A HOPELESS FAILURE FOR TWENTY-SEVEN YEARS.

The Commission and the District Court erred in failing to find that the barge-rail service via the Warrior River has always in the past and still continues to operate at a heavy financial loss; that all the economies of operation on the Warrior River have been exhausted; that the Federal barge line has abandoned all hope of successful operation. More importantly, that the foregoing facts were found by the Examiner of the Commission as set forth in his reports. (R. 225.)

The "experiment" that the Commission mentions in its decision has been in operation on the Warrior River in Alabama for over twenty-seven years. During every one of these years it has incurred a heavy operating loss to the Federal Barge Line. Moreover, the undisputed evidence is that due to the narrow tortuous channel and other physical disabilities the operation will always incur heavy loss. The report of the Examiner states that "clearly they have no hope of putting the Warrior service on a paying basis, although there seems to be no present intention of discontinuing that operation." (R. 269.) This operation has long since ceased to be an experiment. It is a fully developed and hopeless failure, and it is time to stop this shocking waste. (Exhibit No. 1 before the District Court, p. 10053; Ex. 1350, p. 33.)

The Examiner recognizing the unlawfulness of the existing differential in rates states that if the barge line "performed service at less than cost, it would be guilty of an unfair and destructive practice which might call for the

exercise of the Commission's restraining powers." (R. 225.)

The record shows that the upstream tonnage on the Warrior has been principally sugar from the New Orleans district, moving right into the heart of the district that the Savannah refinery was constructed to serve, at preferential barge-rail rates lower than the cost of service. As pointed out hereinbefore, intervener was forced to absorb the differential between the all-rail rates and the differential rates in the sum of $464,133.00, up to the time of the hearing on tonnage in three states alone. (Exhibit 1 before District Court, p. 14196.)

In view of these admitted facts as to the Warrior River operation, the approval of any differential whatever between the all-rail rates and the barge-rail rates results in unreasonable rates in violation of Section 1 of the Act, and also rates that unjustly prefer the shippers of sugar from New Orleans, and unduly prejudice Savannah in violation of Section 3, of the Act. There is no public policy that permits the charging one shipper an established all-rail reasonable rate, and charging a competitor a rate that does not pay for the service received.

The act authorizes the Commission to fix "reasonable differentials," and that expression connotes rates that yield cost of operation and a return on investment or value. In view of the admitted facts as to the Warrior River operation, the Commission is precluded as matter of law from prescribing any differential whatever on sugar moving on the Warrior River route. A differential under such conditions is merely a naked unlawful preference.

THE EXAMINER FOUND THAT THERE WAS NO BASIS FOR PRESCRIBING COMMODITY BARGE-RAIL RATES.

The Commission fixes the differential on class rates as distinguished from commodity rates, and then states that commodity rates shall be published on similar ratios. Sugar pays interstate rail rates upon the commodity basis.

The Examiner refers to the nature of commodity rates as dealing with special situations (such as the important competitive movement of sugar), as distinguished from class rates that are a fixed standard for general traffic. He refers to the evidence before the Commission dealing with commodity rates and says that "the age of that evidence raises doubt whether it portrays the present situation," and rightly declines to approve any basis of commodity rates. This Court has held that a lawful order can not rest upon a stale record. (*Atchison, Topeka & Santa Fe* v. *U. S.*, 284 U. S. 248.)

The Examiner finds that "In view of the foregoing circumstances, it seems necessary that the findings in this proceeding be restricted to class and column rates." (R. 273.)

Notwithstanding this finding of its Examiner the Commission goes ahead and orders differential commodity barge-rail rates. The movement of interstate traffic in this country by volume upon Commodity rates is many fold that moving upon class rates. The action of the Commission in arbitrarily prescribing class rates upon some basis wholly unsupported by essential findings of fact; and then following that up by merely saying that this same undisclosed basis shall apply on barge-rail Commodity rates from New Orleans, also without any basic finding of fact, is patently arbitrary and unlawful.

ARTICLE 1, SECTION 9, CLAUSE 6 OF THE CONSTITUTION PROHIBITS A PREFERENCE OF THE PORTS OF ONE STATE OVER THOSE OF ANOTHER.

The Savannah refinery adopts the argument in the brief of the Texas interveners on the subject of the unconstitutionality of the decision in administering Section 307 (d) of the Interstate Commerce Act in such manner as to prefer one port over another. The record in 26712 shows that Savannah as a port is in competition with the port of New Orleans and is affected in the same way as are Galveston and Houston in competition with New Orleans. The State of Louisiana is thus unconstitutionally preferred by the failure of the Commission to raise the barge-rail rate on sugar from New Orleans to the lawful basis of the all-rail rate.

CONCLUSION.

We have shown hereinbefore the continuing unlawful effect upon the Savannah Refinery flowing from the existing barge-rail differential rates for the interstate transportation of sugar. There is no lawful basis for differential barge-rail rates on sugar from New Orleans lower than the all-rail rates. The Court's attention is invited to the section of the Commission's report entitled "The Justification for Differentials", 70 I. C. C. 609-13. (R. 39-44.) A mere reading thereof leads to the inescapable conclusion that the Commission did not even purport to test the reasonableness and lawfulness otherwise of the rates and differentials which it prescribed by any substantive provision of the Interstate Commerce Act. It made no attempt to base its order on the evidence before it. The order is admittedly based upon the Commission's interpretation of certain general expressions of congressional policy as a mandate for the prescription of differ-

entials between all-rail and barge-rail rates lower than rail rates, regardless of relative cost of service or other transportation circumstances and conditions developed upon the record before it. The Commission's order is not supported by essential findings or substantial evidence and there is no rational basis for the order. It has exceeded its authority, and its action is arbitrary, unlawful and void.

The judgment of the District Court should be reversed and the case remanded to that Court with directions to set aside the order of the Commission and for further proceedings in conformity with the opinion of this Court.

Respectfully submitted,

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October 16, 1950.

SUPREME COURT, U.S.
FILED
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Nos. [redacted]
45-48

In the Supreme Court of the United States

OCTOBER TERM, [redacted] / 1950

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

RAILROAD COMMISSION OF TEXAS, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

SAVANNAH SUGAR REFINING CORPORATION, APPELLANT

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF INTERSTATE COMMERCE COMMISSION TO AFFIRM

In the United States District Court for the Northern District of Illinois, Eastern Division

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

MOTION TO AFFIRM

Appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal [1] from the final judgment and decree entered on January 12, 1950,[2] by a specially constituted district court of three judges

[1] Separate appeals from the District Court's decision have been filed by (1) Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and the Railroad Commission of Texas, and (2) Savannah Sugar Refining Corporation. This motion is directed to all appeals. It is apparent that if the motion is granted as respects the railroads' appeal, there is no substance or merit to the separate appeals. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46; *Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131.

[2] The Court rendered its opinion and made findings of fact and conclusions of law on January 12, 1950.

established pursuant to Section 2284 of Title 28, United States Code, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on March 7, 1950, and appeal papers served on March 9, 1950.

The Commission's order dated June 13, 1949, entered in a proceeding entitled *Rail and Barge Joint Rates,* Docket No. 26712, required appellant railroads and appellee barge lines to establish through routes and joint rates for the transportation of property in joint rail-barge service.[3] (270 I. C. C. 591; 274 I. C. C. 229.)

The joint rates prescribed were designed to provide a reasonable and more flexible rate structure than that which had resulted through an evolutionary process since the inception of joint barge service and the original prescription of joint rates in 1920.

The history of rail-barge transportation on the Mississippi River and its tributaries, together with details concerning the rate structure applicable thereto prior to the entry of the instant order and reasons prompting institution of a general investigation by the Commission of rail-barge joint rates and routes, is comprehensively set forth in the Commission's report of July 7, 1948, 270 I. C. C. 591, and more succinctly, in

[3] For convenience of the various types of joint service covered by the order, such as rail-barge, barge-rail, rail-barge-rail, etc., will be referred to as rail-barge.

the opinion of the District Court sustaining the reasoning in that report.

This appeal does not challenge the statutory power of the Commission to prescribe reasonable through routes and joint rates for joint rail-barge service. The order here involved was issued pursuant to powers given the Commission by Section 307 of the Interstate Commerce Act (49 U. S. C. 907) wherein it is provided that the Commission can, whenever deemed by it necessary or desirable in the public interest, establish through routes and joint rates applicable to the transportation of passengers or property by water and by rail. Paragraph (d) of said section specifically provides that:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified by the all-rail rates and joint rates in connection with such common carrier by water.[4]

[4] The Commission's order provides that rail carriers participating in the joint rates will receive the same division of such rate as they would from a joint all-rail rate. Therefore, in connection with the division to be received by the large lines, Section 307 (f) (49 U. S. C. 907 (f)) is pertinent in that it provides that the Commission shall give due consideration, among other factors, "to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed" as well as "to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service. * * *" This latter provision is similar to the

Additional statutory authority for said order is furnished by Section 3 (c) of the Inland Waterways Corporation Act (49 U. S. C. 141) which declares it to be the policy of Congress to continue the transportation service of the Inland Waterways Corporation until, among other conditions:

> * * * there shall have been published and filed * * * such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers.[5]

The order may properly be classed as an implementation of the National Transportation Policy incorporated in the Interstate Commerce Act wherein it is expressly stated to be the policy of Congress to require the Act be so adminis-

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so-called "Rule of Rate Making" in Section 15a (2) of the Act regarding rail carriers and was especially designed to protect water carriers and to prevent the public from being deprived of the low cost service furnished by them. 84 Cong. Rec. 6128.

[5] A current reiteration of the stated Congressional policy is set forth in Senate Report No. 1204, 81st Cong., 1st Sess., dated October 31, 1949, on Bill S. 211, amending the Inland Waterways Corporation Act. In explaining an amendment to the Act, the report states:

This section also amends subsection (c) of section (3) of the Act. * * * The amendment, however, repeats the previous declaration of policy as contained in the original act *and is so repeated so that there can be no question as to the intent of Congress to have the declaration of policy including establishment of joint tariffs with rail carrier carried through to fruition.* [Italics supplied.]

tered as to recognize and preserve the inherent advantages of each mode of transportation subject to the provisions of the Act (49 U. S. C., notes preceding sections 1, 301, 901 and 1001).

By this appeal twenty-seven railroad appellants, representing themselves as well as all other rail carriers similarly situated, seek this Court's review of matters earlier considered in detail by the Commission and the District Court and found lacking in substance and merit.

Reduced to its simplest form, this appeal challenges the power of the Commission to prescribe joint rail-barge rates (differentially) lower than all-rail rates between the same points unless the Commission makes a finding that the operating costs on such joint rail-barge routes are lower than the costs for all-rail service. The appeal seeks a ruling by this Court that such a finding is a prerequisite to Commission action fixing joint rail-barge rates despite the fact that the Commission found that at the time of its decision the only cost data before it was hopelessly out-of-date and valueless for the purpose intended, covering as it did the 1933–38 period. (270 I. C. C. 591, 604.) It is equally apparent that such contention seeks to make a carrier's operating costs the exclusive "yardstick" in the determination of its transportation rates. Even a cursory examination of appellants' Assignment of Errors and Jurisdictional Statement discloses the complete dependency of appellants on the proposition

briefly stated above—that operating costs are the sole determining factor in the calculation of freight rates. This proposition was the keynote of appellants' case before the Commission and before the District Court, and is now relied upon as the basis for reversal of the earlier administrative and judicial decisions. In addition, appellants attack generally the sufficiency of findings and evidence to support the quantum of rates prescribed.

Brief reference to the Commission's report (270 I. C. C. 603) will show that appellants from the outset of the Commission's investigation sought to prevent prescription of joint rates less that all-rail rates, urging justification for such contention to be the absence of any economy based on cost of service in favor of the joint service. The Commission specifically states that:

> Approximately one-fourth of the record deals with cost of transportation service by rail and barge. At the outset of the hearings the railroads announced their intention of showing "that the cost of transporting freight by barge-and-rail routes is not less than the cost of transporting freight by the all-rail routes, that the fact of the matter is that the all-rail routes are far more economical than the barge-and-rail routes" contrary to the view theretofore widely held, and frequently expressed that water transportation, including that performed by the barge lines,

> is inherently cheaper, as a general proposition, than rail transportation. Federal and Valley accepted the challenge in this assertion. (270 I. C. C. 591, 603.)

Independent of the alleged conclusive character of the "cost of service" factor as determinative of transportation rates generally, attention must be directed to the value of the factual data in this regard placed before the Commission. As stated by appellants in their Jurisdictional Statement, all cost data placed before the Commission by the barge and rail carriers was referred for study to the Cost Section of the Commission's Bureau of Transportation, Economics and Statistics, and at one of the hearings a restatement of rail and barge cost data with supporting details was introduced in evidence by members of the staff of the Commission's Cost Section, who reached the general conclusion quoted by the Commission in its report that:

> * * * the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic. (270 I. C. C. at p. 604.)

The Commission's investigation was instituted in 1934, hearings were concluded in 1943, a record of over 16,000 pages of testimony and over

1,500 exhibits was developed, and its principal report was entered on July 7, 1948.[6] As admitted by appellants in their Jurisdictional Statement:

> Because of changes in conditions which had taken place subsequent to the period 1933–8 covered by the cost studies, the Commission did not make a specific finding of the relative all-rail and barge-rail costs during the period 1933–8.

The Commission's statement in this regard was:

> Testimony in the nature of comment on the restatement of the cost section was received from respondents, who also filed supplemental briefs setting forth their criticisms of the restatement and the supporting data. No useful purpose would be served by reviewing these criticisms with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933–38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail. (270 I. C. C. 591, 604.)

Following this observation, the Commission noted some of the changes in conditions affecting barge service and operating costs and concluded that:

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail trans-

[6] The Commission entered a Supplemental Report on June 13, 1949 (274 I. C. C. 229), containing minor modifications of its earlier report.

> portation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials. (270 I. C. C. 606.)

The Commission directly met the challenge of the rail carriers as to the insufficiency of its findings on cost of service by noting that:

> * * * in a number of our earlier reports dealing with the question of barge-rail differentials, * * * we stressed lower cost of barge service as an important reason for such differentials, but in no instance did we decline to prescribe or approve differential rates because the economy thereof had not been affirmatively shown. Furthermore those decisions antedated the enactment of Section 307 (d). Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is such an affirmative showing. (270 I. C. C. 611.)

Earlier decisions of the Commission attest to the accuracy of the statement that transportation rates are not controlled by nor made with an eye to operating costs. *Consolidated Southwestern Cases,* 123 I. C. C. 203, 374; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.,* 155 I. C. C. 691, 696–7; *Switching Rates in Chicago District,* 177 I. C. C. 669, 705; *Lighterage Cases,* 203 I. C. C. 481, 510; *Proposed Lake Erie-Ohio Canal,* 235

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I. C. C. 753, 761; *Charges for Protective Service to Perishable Freight,* 241 I. C. C. 503, 510–11. This Court has also sustained the Commission's conclusions in this regard, *New York* v. *United States,* 331 U. S. 284, 328; *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, 500.

It was in the light of these authorities that the District Court appropriately concluded:

> * * * plaintiffs' insistence that lower costs are essential to the existence of differentials completely ignores one of the fundamental principles of economics, namely, that the price of a product or a service is determined by its *value* to the consumer. Of course, operating costs incidentally affect the price by establishing a level below which the price cannot be allowed to fall, but, above that level, it is the value to the consumer which finally determines what the price will be.

Perceiving directly the basic error in appellants' reasoning, the District Court stated:

> In the instant case, assuming that the operating costs of the railroads are less than those of the barge lines, it does not follow that joint barge-rail rates should be equal to or greater than all-rail rates, for so to hold would be utterly to disregard the relative values of the respective services and, incidentally, to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads,

which provide to the shipper a far superior service. More important, then, than the relative operating costs of rail and water carriers is the relationship between the rate charged by the rail carrier and the operating costs incurred by the water carriers. So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating costs and all-rail rate, is lower than that prescribed for the superior service. Only when the rates charged by the railroads are so low that joint barge-rail freight cannot be transported profitably at a lower rate—i. e., when barge-rail operating costs approach all-rail rates—will there be reason to deny the inferior service the right to exist.[7] In the joint rates established, the railroads retain their regular rates; the differential between the all-rail rates and the rail-barge rates is absorbed by the barge lines.

In addition, the District Court in construing the statutory power of the Commission under Sec-

[7] In a footnote, the District Court illustrated the faulty reasoning of appellants by observing:

Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor.

tion 307 (d) to prescribe lower rates for rail-barge service held:

> The statutory provision empowering the Commission to prescribe differentials (Section 307 (d) of the Transportation Act of 1940) does not make the exercise of this power conditional on an affirmative showing of lower operating costs, but directs that "* * * the Commission shall prescribe such reasonable differentials as it may find to be justified * * *." As the Commission stated in its report, "Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is * * * an affirmative showing (of lower operating costs)."

Appellants' reliance upon *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, as support for their position, is also without merit. That controversy presented the factual situation where a rail carrier sought to exact for similar service a higher rate from one class of shippers than from another. This Court held:

> To justify increasing the reshipping rates of ex-barge grain the Commission would have to make findings supported by evidence to show how much greater is the cost to the eastern roads of reshipping ex-lake or ex-rail grain moving from the same localities and requiring the same service as does the ex-barge grain. * * * The unsifted averages put forward by the Commission do not measure the allegedly

> greater costs nor indeed show that they exist. (330 U. S. 567, 583.)

This ruling when applied to the situation presented by the instant appeal—where all cost data relied upon by the appellant rail carriers was properly rejected as "stale" by the Commission—clearly shows that such data cannot, no more than could the "unsifted averages" in the *Mechling* case, be used as the basis for computing competing freight rates.

Nor can it be held, and we do not understand appellants to so contend, that the *Mechling* case stands for the proposition that a structure of rates applicable to competing forms of transportation must be computed in direct relationship to operating costs, even if the same were accurately established.

The instant case implements the doctrine of the *Mechling* decision in that the rates prescribed preserve the availability of cheaper (but inferior) water transportation service to the shipping public at cheaper rates for the inferior service, because without some advantage of rates to users of water transportation service, the result would be, as found by the District Court, "to end effectively all barge-rail traffic."[8]

---

[8] And in the same light:

> * * * insofar as the inherent cheapness of the barge leg of the through route produces a disparity between barge-rail rates and local rail rates, Congress has said that the Act must be so administered as to preserve, not eliminate or reduce the disparity. (330 U. S. 567, 580.)

It is also submitted that the District Court's decision, together with its findings of fact which more fully reviews the evidence before the Commission, adequately disposes of any contention by appellants concerning the alleged insufficiency of evidence to support the findings made by the Commission. The District Court found contrary to what is contended by appellants, that

> Although the Commission placed great emphasis on what it conceived to be the policy of Congress, it is evident from the report that numerous other factors were given due consideration by the Commission.

The District Court further found that while appellants asserted it was impossible to determine how the specific differentials were arrived at, again the Commission's report indicated otherwise, and that comprehensive proposals for the establishment of differentials were submitted and considered in detail by the Commission. The District Court concluded that:

> From the foregoing discussion, it would seem apparent that the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence, and that they are the product of the Commission's expert, informed judgment on the subject. (*Ayrshire Collieries Corp.* v. *United States*, 335 U. S. 573, 592).

For the foregoing reasons, it is evident that this appeal presents no question requiring independent review of the convincing decision of the District Court. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed on motion.

DANIEL W. KNOWLTON,
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EDWARD M. REIDY,
Associate Chief Counsel,
For Interstate Commerce Commission.

MARCH 21, 1950.

CERTIFICATION OF SERVICE

I certify that a copy of the foregoing motion to affirm was served on counsel for all parties of record by mail this 21st day of March 1950.

EDWARD M. REIDY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 45

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 47

RAILROAD COMMISSION OF TEXAS,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 48

SAVANNAH SUGAR REFINING CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM OF AMERICAN BARGE LINES COMPANY, INLAND WATERWAYS CORPORATION, OPERATING FEDERAL BARGE LINES, AND MISSISSIPPI VALLEY BARGE LINE COMPANY.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 1434

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, ET AL.,

Defendants.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, American Barge Lines Company, Inland Waterways Corporation operating Federal Barge Lines, and Mississippi Valley Barge Line Company, intervening defendants in the above-entitled cause, move that the judgment and the decree of the District Court be affirmed.

Statement

This is a direct appeal from the final judgment and decree of a specially constituted court of three judges dismissing the suit of the Alabama Great Southern Railroad Company and other plaintiff railroads to set aside an order of the Interstate Commerce Commission. Findings

of fact, conclusions of law, and the judgment and decree of the court were entered on January 12, 1950. The appeal of the plaintiff railroads was allowed on March 7, 1950, and appeal papers were served on Chicago counsel on that date.

The Commission's order, dated June 13, 1949, was made in a proceeding docketed as *No. 26712*. That was an investigation instituted by the Commission on its own motion into and concerning the reasonableness and lawfulness otherwise of existing differential through routes and joint rates between the above-named barge lines and their rail connections, and for the purpose of determining and establishing such additional reasonable through routes and differentials as might be justified for barge-rail service. The above-named barge lines and the plaintiff-appellant railroads were respondents in the Commission proceeding. Hearings were had over a period of eight years, during which more than 16,000 pages of testimony and over 1,500 statistical exhibits were received in evidence. At the conclusion of the hearings, the Examiner of the Commission submitted a proposed report to which exceptions were filed and oral argument had. Thereafter the Commission issued its report on July 7, 1948, as modified on June 13, 1949. That report, accompanied by an order of June 13, 1949, required the respondents, collectively, to establish specified through routes and to observe specified differentials to take the place of and in addition to the through routes and differential rates then in effect. The respondent railroads elected not to comply with the order of the Commission but instead filed this suit.

Stripped of surplusage, duplication and formalistic matters of pleading, the plaintiff railroads relied in the District Court on three alleged grounds of invalidity: (1) that the ultimate conclusion of the Commission is not adequately supported by findings which disclose the

premises, methods, and processes by which the Commission arrived at the prescribed differentials; (2) that the Commission did not act upon the evidence nor did it give due consideration to all relevant facts and factors but rather it prescribed differentials arbitrarily based solely on a presumed policy of Congress; and (3) that in the light of the record and the findings, or lack of findings, in the report as to relative costs of service, the Commission misconstrued the governing statutes in fixing differentials in favor of the barge-rail routes. This third point rests on two alleged factual premises, and one legal proposition, i.e., (a) that the Commission affirmatively found barge-rail costs of service to be no less than all-rail costs for transporting like commodities between like points, (b) that the evidence affirmatively showed the railroads to be the lower cost agency, and (c) that the Commission cannot, within the authority conferred by section 307(d) of the Interstate Commerce Act (49 U.S.C. § 907(d)), determine and prescribe differential barge-rail rates unless it uses relative costs of service as the controlling measure thereof.

Summary of District Court's Opinion

The District Court found against the plaintiff railroads on all points. It held:

1. That the Commission's report has "ample support in evidence and in informally stated findings contained therein" and that "The Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seemed to us to comprise the '*quasi*-jurisdictional' findings which the Supreme Court has declared essential." (See also the court's Findings of Fact Nos. 3, 4, and 6.)

2. That "although the Commission placed great emphasis on what seemed to be the policy of Congress, it is evident

from the report that numerous other factors were given due consideration by the Commission;" and "that the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence."

3. That the exercise of the power conferred by section 307(d) to prescribe reasonable differentials between barge-rail and all-rail rates is not, as claimed by plaintiff railroads, made "conditional on an affirmative showing of lower operating costs;" and that "proof of lower costs of service is [not] an absolutely essential condition for the creation of such differentials."

4. That the finding of the Commission reading: "In the face of these facts, we cannot find that at the present time there are demonstrable economies in barge-rail transportation . . . which from the standpoint of cost of service would justify differentials," reflects simply a conclusion of the Commission that the evidence relating to relative cost of service in 1933-38 was stale and would not support any finding, one way or the other, as to present relations; and that "such a negative conclusion, we think, cannot be said to constitute an affirmative finding that all-rail costs are lower than barge-rail costs."

5. The District Court pointed out that the argument of the plaintiff railroads as the significance of relative costs of service "rests, of course, on the premise that the cost of shipping all-rail is, in fact, less than the cost of shipping barge-rail." As to that, the District Court found that the "plaintiffs have failed to establish the premise on which the argument is based."

6. In finding that the plaintiff railroads had not established the premise relied upon by them, the District Court noted that the only finding of the Commission on the point

was the negative finding referred to in paragraph 4 above, and further observed that the cost data relied upon by the railroads was not sufficient to support a finding, even if current, because it represented *average system costs* rather than the *costs actually incurred* in transporting the particular commodities which move in barge-rail service over the routes in question, citing *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 380-381.

7. The District Court further noted that to accept the views of plaintiff railroads as to the controlling effect of relative costs of service would compel the Commission to ignore what it should not ignore—the element of the value of the service to the customer; that to ignore the value of service "would end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service;" and that any costs to be used on the barge side of the equation in determining reasonable differentials in relation to existing all-rail rates would seem more likely to mean the costs, that is, the charges to the public.

Certain interests in Texas and at Savannah who have also appealed [1] intervened as plaintiffs to complain that the order of the Commission violates Article I, section 9, clause 6 of the Constitution, which prohibits a preference of the ports of one state over those of another, and that the order prescribes unreasonably low barge-rail rates which were arrived at by an improper process and which unduly prefer an advantage New Orleans over Savannah and the Texas ports. The District Court held that New Orleans enjoys barge service because of a natural advantage of its location on the

[1] Galveston Chamber of Commerce, Houston Port & Traffic Bureau, Railroad Commission of Texas, and Savannah Sugar Refining Corporation.

Mississippi River, which advantage could not be nullified by depriving New Orleans of barge-rail rates which are otherwise lawful, and that the enjoyment of that advantage was not prohibited by the Constitution, citing *Interstate Commerce Com.* v. *Diffenbaugh*, 222 U. S. 42, 46, and *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131.

The Appeal Presents No Substantial Questions

The errors assigned by the plaintiff railroads are stated in 24 numbered paragraphs which involve considerable duplication. However, when interpreted and summarized in the plaintiff railroads' jurisdictional statement, all questions alleged to be substantial arise in connection with the following:

1. Is the order based on relevant evidence with consideration fairly given to all matters relied upon by the plaintiff railroads?

2. Is the order adequately supported by findings?

3. Is the power to prescribe barge-rail differentials conditioned upon the receipt of evidence and the making of findings with respect to costs of service via barge-rail as compared with via all-rail?

We show below that the appeal involves no substantial question as to any of these matters.

The Order Is Based on Relevant Evidence and on All of the Evidence

The railroad plaintiffs charge that the Commission rested its decision entirely on an assumed policy of Congress rather than the evidence in the record. But the detailed recitals of the District Court in Findings of Fact, Nos. 3, 4 and 6, as well as the comprehensive analysis of the Commission's report provided in its opinion, show such a charge to be

unfounded and without substance. Action within the competency of the Commission cannot be successfully challenged when based on relevant evidence of record. *Interstate Comm. Com.* v. *Union P. R. Co.*, 222 U. S. 541, 550; *Virginian R. Co.* v. *United States*, 272 U. S. 658, 663.

The plaintiff railroads also charge that the Commission based its decision in part on a fact not legally relevant to the issues, i.e., the inferiority of barge-rail service as compared with all-rail service. That fact bears upon the relative value of the service to shippers. In *United States* v. *Illinois C. R. Co.*, 263 U. S. 515, 524, the Supreme Court recognized value of the service as a valid criterion in rail rate-making, and the rule could hardly be different in a barge-rail rate case. That rule has been consistently observed by the Commission in rate cases of every kind and description, including the barge-rail rate cases cited in footnotes 3 and 4 below.

The final question as to evidence is whether any was ignored which the Commission should have considered. Neither in their complaint nor in their argument before the District Court did the plaintiff railroads specify any relevant, material, and competent, current evidence which the Commission failed to consider. However, in their jurisdictional statement they now assert that the Commission acted "in complete disregard of the evidence showing that the rail carriers are economically best fitted to handle the traffic" (p. 9); that the Commission disregarded and ignored the cost evidence of the railroads (pp. 9-11); and that the Commission ignored relative cost of service (p. 12). The report of the Commission plainly shows it considered the evidence of plaintiff railroads as to cost of service to be stale and, on that particular ground, insufficient to support an affirmative finding one way or the other on the point. The District Court accepted as proper this view of the Commission as to such evidence. The plaintiff railroads fail to

charge that either the Commission or the District Court erred in refusing to accept stale evidence as proof of current costs. Nor do they charge that the District Court erred in finding that evidence as to average railroad system costs for all traffic is not evidence as to actual costs of transporting particular traffic. Other than these unfounded and unpressed claims as to the disregard by the Commission of cost evidence, the plaintiff railroads do not allege that the Commission disregarded any evidence which meets the test of relevancy, competency and materiality.

The report of the Commission and the decision of the District Court plainly show that the appeal involves no substantial question relating to the matter of evidence.

The Order Is Supported by All Necessary Findings

The plaintiff railroads make two contentions which involve the matter of findings: (1) that the order is invalid because the Commission failed to make a specific finding as to the reasonableness of through rates which result from the observance of the differentials specifically found by it to be reasonable, and (2) that the order is invalid because the report of the Commission does not contain findings which describe the specific premises, methods and processes involved in the ultimate fixation of particular differentials.

The first contention rests on no allegation of complaint nor was it discussed in the District Court. However that may be, section 307(d) plainly discloses the intent of Congress to authorize the fixation of reasonable barge-rail rates by the direct process of fixing reasonable differentials. To fix reasonable differentials is to fix reasonable rates. Since the two cannot be legally distinguished, no substantial question is raised.

As to the second question—the alleged necessity for preliminary findings—the case is clearly controlled by *Balti-*

more & O. R. Co. v. *United States*, 298 U. S. 349, 359, in which the Supreme Court held that "There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Useful precision in respect of either would be impossible."

The appeal presents no question which is either novel or substantial as to the matter of findings.

An Order Fixing Barge-Rail Differentials Need Not Be Based on a Finding as the Relation of Barge-Rail to All-Rail Costs of Service.

The plaintiff railroads contend that the power to prescribe reasonable differentials conferred by section 307(d) when construed in the light of the National Transportation Policy is conditioned on the receipt of evidence and the making of an affirmative finding with respect to relative costs of service. Practically everything said in their jurisdictional statement either starts from or comes back to this point, and on it their whole case rises or falls.

Before considering the legal question involved, we note that on occasion the plaintiff railroads proceed on the assumption that the Commission's negative finding as to lack of current evidence to prove demonstrable evidence is, in reality, an affirmative finding on the question of cost relations. But, as noted above, the District Court held squarely to the contrary and no error is assigned against that specific holding. Consequently, the only question raised on appeal is whether the lack of current evidence and an accompanying finding as to relative costs of service is fatal to the attempted exercise of the power conferred by section 307(d).

In support of their view, the plaintiff railroads assert that the decision of the Commission and the District Court

is inconsistent with the decision of the Supreme Court in *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567. But the plaintiff railroads treat that case as if it involved the reasonableness of rates under section 1, whereas it only involved the matter of rate discrimination against connecting lines under section 3(4) of the Interstate Commerce Act. Statements of the court at pages 571, 572-3, 575, 577, 580 and 581, clearly show that the court, in dealing with the issue before it, tested the inherent advantage of barge service by the relation of barge rates to rail rates rather than by the relation of barge costs to rail costs.

Many decisions of the Supreme Court, cited below, show that there is nothing new to be decided in this case as to the right of the Commission to fix reasonable rates in the absence of evidence and without findings as to cost of service. In *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U.S. 125, 132, an order of the Commission requiring the addition of a particular plus amount to rates which covered the crossing of the Mississippi River was assailed as beyond the authority of the Commission because entered without evidence as to the cost of performing the special services involved. Plaintiffs' claim in that respect was squarely rejected by the Supreme Court. The court said:

> Neither the failure of the Commission separately to ascertain and state, nor the absence of evidence to show, the cost to carriers of the ferry service requires annulment of the rates prescribed for transportation between the places on the east bank of the Mississippi and points west of the river.

In *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 359; *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481; and *New York* v. *United States*, 331 U.S. 284, 331, the Supreme Court held that the weight to be given cost evidence and the degree of acceptance or rejec-

tion of such evidence is wholly within the Commission's final say-so.

In *New York* v. *United States, supra,* and in *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592, the Supreme Court held that the Commission is not required to fix rates and rate relations in direct proportion to relative costs or relative service, and that the prescription of rate relations known to be *contrary* to cost of service relations is within the authority of the Commission when based on evidence other than costs.

The rule on the point under consideration is so well settled that the appeal presents no substantial question unless section 307(d), as construed in the light of the National Transportation Policy, imposes a limit, restriction, or condition on the authority of the Commission when fixing barge-rail differentials which is not imposed in fixing other rates. That question will now be considered.

The Power conferred by Section 307(d) Is Not Conditioned on Findings as to Relative Cost of Service

There is nothing in the terms of section 307(d) or in the legislative history which suggests the limitation on the authority of the Commission for which the plaintiff railroads contend.

The existing differential rate structure has been built up beginning the period of World War I when the Director General of Railroads inaugurated barge service and fixed a 2 percent differential based on judgment rather than cost studies. Nothing in the *Transportation Act, 1920* (49 U. S. C. Sec. 142) when the railroads were returned to private control and barge operations were transferred to the Secretary of War; or in the *Inland Waterways Corporation Act* of 1924 (49 U. S. C. Sec. 151 and following), which transferred those operations to a Federal corporation; or

in the *Denison Act* of 1928,[2] which added to the Commission's authority to prescribe through routes and joint rates between barge lines and rail lines, so much as suggests that the reasonableness of differentials should be tested exclusively, or even in part, by a comparison of barge costs with rail costs.

The word "differential" was first mentioned specifically in the Denison Act. Prior to that time, the Commission had established reasonable joint rates and through routes between barge lines and rail lines under its general power over such joint rates when traffic is transported partly by railroad and partly by water under an arrangement for continuous carriage or shipment.[3] In so prescribing barge-rail rates, the Commission fixed reasonable differentials without any evidence as to relative costs of service but with full knowledge that the barge service was inferior and that differentials were necessary to attract the traffic.

In prescribing through routes and joint rates on a differential basis within certain limitations in proceedings under the Denison Act, the Commission again acted without any evidence whatsoever on the question of relative or comparative costs of service.[4]

When the railroads were ordered to join with barge lines in the adjustments prescribed under the Denison Act, they

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[2] (Public No. 601, Seventieth Congress) 45 Stat. 978, Chapter 891, amending Section 3 of the Inland Waterways Corporation Act of June 3, 1924.

[3] *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I.C.C. 317; *Same* v. *Same*, 92 I.C.C. 528; *Inland Waterways Corp.* v. *C. G. W. R. R. Co.*, 129 I.C.C. 521; *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126.

[4] *Application of American Barge Line Co.*, 182 I.C.C. 521, 190 I.C.C. 521, 190 I.C.C. 177; *Through Routes and Joint Rates*, 153 I.C.C. 129, 156 I.C.C. 141, 161 I.C.C. 207, 163 I.C.C. 716, 167 I.C.C. 385, 172 I.C.C. 525, 174 I.C.C. 477, 181 I.C.C. 675, 192 I.C.C. 173, 192 I.C.C. 663; and *Application of Mississippi Valley B. L. Co.*, 167 I.C.C. 41, 171 I.C.C. 37, 178 I.C.C. 224.

had the right to demand a hearing before making such adjustments effective if they so desired (*United States* v. *Illinois Central R. Co.*, 291 U. S. 457) but they chose not to avail themselves of that opportunity. It thus appears throughout the period prior to the enactment of the Transportation Act, 1940, which enactment added section 307(d) to the Interstate Commerce Act, that there was no reliance by the railroads, by the barge lines, or by the Commission on proof of relative costs of service as *an essential* to the determination of reasonable differentials.

The 1940 Legislation

In the late 30's there arose considerable demand for the complete regulation of water carriers in order to equalize competitive conditions and opportunities with rail and motor carriers, already under regulation. Responsive to this demand the President appointed a so-called "Committee of Six" consisting of 3 railway executives and 3 representatives of railway labor, to bring forward a proposed scheme of regulation. Previously in the same year he had requested a report from 3 Interstate Commerce Commissioners—Eastman, Splawn and Mahaffie—on the same subject. On the basis of these reports the Senate Committee on Interstate Commerce drafted a Bill—S.2009—which as amended from time to time and after several joint conferences with the House Committee finally became Transportation Act, 1940.[5]

The regulation of water carriers under this Bill was bitterly opposed by the champions of water transportation. Having in mind its genesis in the Committee of Six, they argued vehemently that it was a "railroad" bill having for its obvious purpose the destruction of water carriage.

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[5] See pages 1 and 2, Report No. 433 (1939) by the Chairman of the Senate Committee on Interstate and Foreign Commerce.

The debates contain many statements from sponsors of the legislation denying this charge and seeking to reassure the objectors. Perhaps the most pointed is a statement by Representative Halleck, a committee member and an ardent supporter of the Bill.[6] At p. 13517 Congl. Rec. July 21, 1939, his statement appears thus:

> Some people have argued and have asked me in good faith if we were not coming in here to destroy the water carriers. Well, now listen. This Government has spent millions and hundreds of millions of dollars to develop cheap economical transportation. No one would be so ridiculous as to seek to destroy this investment. The communities served by this transportation have a right to the continuation of this service. There is nothing in this Bill which seeks to destroy that service. Rail transportation is the most valuable transportation because it is faster and more convenient. The water people will admit that. *If a person had the same rate he would ship by rail rather than water.* As a result the ceiling of rates is fixed by the railroads. The water carriers operate under that ceiling at a competitive point because their costs are less. This bill recognizes that differential and the reason supporting it. This bill provides for the continuation of that differential. I might refer you to the provisions of the bill but I do not want to take the time necessary to read them.
>
> On page 260, in reference to the making of minimum rates for water carriage, this is said:
>
> "They shall pay attention to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service."
>
> Does that mean anything to you or are we to assume that the Interstate Commerce Commission is going to

[6] For additional reference to comments of a similar nature see footnote 8, *Interstate Commerce Comm.* v. *Mechling*, 330 U. S. 567.

throw all of those mandates out of the window? Why, of course, the rates on water transportation *will still be beneath the ceiling of the rail rates.* They will continue to carry on their business. (Emphasis supplied.)

Bearing in mind the facts that the statutes in effect prior to 1940:[7]

1. Contained no mention of the word "differential" until 1928 in the Denison Act;

2. Did not mention the element of "costs" as a condition precedent to the fixation of through barge-rail routes at rates lower than over all-rail routes, and

3. That the Commission had repeatedly prescribed such through routes and joint rates over the objection of the railroads.

it remains only to determine whether the 1940 legislation had the effect here claimed for it by the railroads, viz., that of making a showing of lower *operating* costs, an absolutely indispensable condition precedent to the requirement of barge-rail routes on a differential basis.

In Section 27 of S. 2009 (which displaced Sections 15(3) and 6(13) of the 1920 Act), as it passed the Senate two important changes in the 1920 legislation were made.[8]

1. It eliminated from the old (1920) act the limitation reading "(or, in the case of a through route where one of the carriers is a water line, the *maximum* rates * * * applicable thereto)," thus giving the Commission power to declare maximum, minimum, or maximum and minimum rates in connection with barge-rail routes;

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[7] Sections 6 and 15 from 1920 to 1928, and the Denison Act, 1928 to 1940.

[8] The 1940 act, as finally passed, repealed the Denison Act but left in force until the further order of the Commission all orders made under that act (Sections 320 and 322, Part IX).

> 2. It followed the philosophy of the Denison Act in making the fixation of differentials mandatory by inserting the clause "and in the case of a through route where one of the carriers is a water line, the *minimum differential* which should apply in connection with such route."

In the House, the limitation as to *maximum* rates was also eliminated. But on the question of "differentials" the House version used the following language:

> In the case of a through route where one of the carriers is a common carrier by water, the Commission *may* prescribe such reasonable differentials, *if any*, as it may find to be justified between all-rail rates and joint rates in connection with such common carrier by water. (Emphasis ours.)

Both Houses provided for the "differential"—the Senate in mandatory, the House in permissive terms. Neither mentioned the element of "costs."

Late in 1939 the Commission was asked to express its opinion as to the divergent views of the Senate and House in respect of the legislation and it did so in a report dated January 29, 1940,[9] by Commissioner Eastman as Chairman of the Commission's legislative committee. Addressing itself to the Senate version which read:

> and in the case of a through route where one of the carriers is a water line, (the Commission) shall prescribe the minimum differential which should apply in connection with such route (Parentheses added for clarity),

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[9] This report became House Committee Print on "Omnibus Transportation Legislation," 76th Congress, 3d Session, and it has been referred to by the Supreme Court on two occasions as an authoritative source of legislative history. *Ziffrin Inc.* v. *United States*, 318 U. S. 73, 77; *United States* v. *Seatrain Lines*, 329 U. S. 424, 430.

the Commission said, at p. 47:

> This is objectionable: (1) Because its meaning is not clear, since it does not indicate between what rates the "minimum differential" shall apply; (2) because, assuming that it means the minimum differential between a rail-water rate and the corresponding all-rail rate, it implies that there should always be such a differential, whereas if the rail-water route is unduly circuitous or otherwise uneconomical, there may be no justification for a differential; and (3) because, if the Commission does its duty in fixing reasonable maximum and minimum, or maximum and minimum rates, a differential will be provided for whenever one is justified.

Addressing itself next to the House version which read:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission *may* prescribe such reasonable differentials, *if any*, as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. (Emphasis ours.)

the report of the Commission stated (p. 47):

> If any such language is to be retained, however, the corresponding provisions of the House bill is unnecessary[10] but otherwise unobjectionable.

The Commission thus made it clear that with the positive language of the Senate version deleted from the Bill it would feel free to, and would consider it its "duty" to

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[10] Commissioner Eastman was the author of the two earlier decisions in which the Commission prescribed through rail-barge routes and *differential* rates, when the governing statutes (Sections 15(3) and 6(13)) not only contained no mention of "differentials" but carried a limitation that *rates* over rail-barge routes should be maximum rates. *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528; *Inland Waterways Corp.* v. *C. G. W. R. R. Co.*, 129 I.C.C. 521.

provide differentials unless they were clearly not justified because the proposed routes would be "unduly circuitous or otherwise uneconomical." On the record made in this case the Commission has concluded that the differentials prescribed are justified and are *not* uneconomical.

In the final draft of the Bill the positive mandate in the Senate version was dropped in favor of the House version. But the latter was first amended in two very important ways: (a) The word "shall" was substituted for the word "may" and (b) the words "if any" were deleted.

There is nothing in the legislative history to support the conclusion that in using the term "or otherwise uneconomical" the Commission had reference to "costs" and, more particularly to "system average costs" which, as the District Court held in effect, are utterly worthless in determining whether in any instance a barge-rail route should be prescribed. In addition to the element of undue circuity in the latter type of route—always important—the element of "relative service" comes into play. In other words, it would be wholly "uneconomical" to provide for or to operate a through barge-rail route from Buffalo, N. Y., to New Orleans, La., contemplating water carrier participation only between Cincinnati, O., and Louisville, Ky. The Commission in all of its orders has provided not alone against undue circuity but has required that the haul of the water carrier must be a prescribed percentage of the total haul.

The Commission was eminently correct in concluding (p. 611) that "neither the wording nor the legislative history" of section 307(d) "supports the conclusion that differentials are justified only where there is an affirmative showing of lower operating costs." Consequently, the appeal raises no substantial question as to this point.

Questions Raised by the Appeals of Texas and Savannah Interests Are Not Within the Scope of Judicial Review

The separate appeals of the Texas and Savannah interests present no question within the scope of judicial review which is not presented in the appeal of the plaintiff railroads. These intervening plaintiffs are dissatisfied with the Commission's order because it provides for New Orleans the advantage of its geographical location on the Mississippi River. That does not nullify the order but rather supports it under the doctrine of *Interstate Comm. Com.* v. *Diffenbaugh*, 222 U. S. 42, 46, in which the Supreme Court held that "the law does not attempt to equalize fortunes, opportunities or abilities."

The assignments of error and the discussion in the jurisdictional statements of these intervening plaintiffs indicate that what they really seek is to have the Supreme Court substitute its judgment for that of the Commission as to the measure of the differentials to be prescribed and as to the processes which should be followed in arriving at such differentials. Since any such action on the part of the Supreme Court would be beyond the scope of judicial review, these appeals present no substantial question. As to the other point made by these intervening plaintiffs, the alleged violation of the port preference clause in the Constitution, the correctness of the holding of the District Court is fully supported by *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131.

Conclusion

Section 14(1) (49 U. S. C., §14(1)) provides:

> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and *in case damages are awarded* such report shall include the findings of fact on which the award is made.

No damages were awarded in this case and the Commission was under no obligation to "specify the weight given to any item of evidence or fact or disclose mental operations by which its decision was reached" (*Baltimore & O. R. Co.* v. *United States, supra*). Under the doctrine of *Rochester Telephone Corp.* v. *United States*, 207 U. S. 125, 140, "only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be reached. If these legal tests are satisfied, the Commission's order becomes final."

Congress, and through it the Commission, has undoubted power under the commerce clause to prescribe through routes and joint rates whenever it finds such prescription to be in the public interest. Once that finding is made, as it was in this case, the order of the Commission is valid unless (a) it acted without substantial evidence, or (b) its order results in rates which are confiscatory. The record of 16,000 pages and 1,500 multiple-page exhibits affords mute testimony as to the substantiality of the evidence. The railroad plaintiffs are in no position to raise the question of confiscation because, under the scheme of differentials prescribed, they will receive revenue out of the joint

rates with barge lines substantially the same as they would receive from railroad connections.

Since it is evident that none of the appeals present questions which are either novel or substantial, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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March 22, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

RAILROAD COMMISSION OF TEXAS, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

SAVANNAH SUGAR REFINING CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

FOR THE NORTHERN DISTRICT OF ILLINOIS
ON APPEALS FROM THE UNITED STATES DISTRICT COURT

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 45

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 47

RAILROAD COMMISSION OF TEXAS, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 18

SAVANNAH SUGAR REFINING CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the District Court for the Northern District of Illinois (R. 173) is reported in 88 F. Supp. 982. The reports of the Interstate Commerce Commission (R. 16, 75) appear in 270 I. C. C. 591 and 274 I. C. C. 229.

JURISDICTION

The final decree of the three-judge district court was entered on January 12, 1950 (R. 189). The petitions for appeal were presented and allowed on March 7, 1950, and March 10, 1950 (R. 190, 196, 198, 202, 203, 207, 208, 213). The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b), and 2325. Probable jurisdiction was noted on May 15, 1950 (R. 460).

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act and the Inland Waterways Corporation Act are set forth in the Appendix, *infra*, pp. 52–56.

QUESTIONS PRESENTED

The Interstate Commerce Commission issued an order requiring rail carriers to join connecting barge lines in establishing through routes and joint rail-barge rates computed by deducting specified differentials from corresponding all-rail rates. The principal question presented is:

1. Whether, as appellants contend, a finding that the operating costs of rail-barge service are lower than those of all-rail service is essential to the validity of an order prescribing rate differentials; or whether, as the district court held, such an order is valid when based upon considerations of the value of the respective services to shippers, the willingness of the barge lines to operate at the lower rates and absorb the differentials, the effect of rates upon traffic, and the conditions necessary to the development of a sound and adequate national transportation system.

A subsidiary question is:

2. Whether the order prescribing differentials constitutes an unlawful or unconstitutional discrimination against certain ports and shippers and in favor of New Orleans and other ports on inland waterways.

STATEMENT

These are direct appeals from the judgment of a three-judge district court denying an injunction to restrain enforcement of an order of the Interstate Commerce Commission requiring rail carriers to joint connecting barge lines in establishing through routes and joint rail-barge rates calculated by deducting specified differentials from corresponding all-rail rates between the same origins and destinations.[1]

The three barge lines which are appellees in this proceeding[2] are Inland Waterways Corporation, a government corporation supervised by the Department of Commerce (Federal), Mississippi Valley Barge Line Company (Valley), and American Barge Line Company (American). Among them they handle about 5½ million tons of cargo annually.[3] Federal serves St. Louis, Chicago,

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[1] Appellants in No. 45 are the 26 railroads who instituted this action. The other appellants were intervenors on the side of the plaintiffs in the court below—in No. 46, Galveston Chamber of Commerce and Houston Port and Traffic Bureau; in No. 47, Railroad Commission of Texas; and in No. 48, Savannah Sugar Refining Corporation.

[2] In addition to the United States, the Interstate Commerce Commission, and the three barge lines, appellees include the following other intervenors in support of the Commission's order: Baton Rouge Traffic Bureau, Inc., Memphis Freight Bureau, Inc., and New Orleans Traffic and Transportation Bureau.

[3] In 1947 Federal carried 2,154,412 tons, Valley carried 2,076,470 tons, and American carried 1,385,666 tons (R. 22–24).

Minneapolis-St. Paul, Omaha, New Orleans, Port Birmingham and intermediate ports. Valley serves Cincinnati, St. Louis, Pittsburgh, and New Orleans, as well as points on the Monongahela River. American operates principally between Pittsburgh and New Orleans. The operations of the two private barge lines have been profitable. Federal has had some profitable periods, but has incurred an average net deficit of $242,431 per year. (R. 20–24.)

Two of the barge lines (Federal and Valley) interchange substantial quantities of freight with connecting rail carriers, although the volume of this type of transportation has decreased in recent years. In the case of Federal the joint traffic has declined from 68 percent of its total tonnage in 1930 to 17 percent in 1947. Fifty-five percent of Valley's traffic was interchanged with railroads in 1941 as against 2 percent in 1947 (R. 20–23).

For nearly 35 years Congress has encouraged the development of inland water transportation and has attempted to promote the interchange of traffic between rail and water carriers. The instant cases represent one aspect of the long struggle over the role to be played by the inland water carriers in our national transportation system. To place the present controversy over rate relationships in perspective it is necessary briefly to trace the history of the struggle that has gone before.

In 1917 freight movement on the Mississippi and Warrior Rivers had virtually ceased (R. 20). But in 1918 Congress, in a war measure primarily designed to provide federal control of the railroads, gave broad authority to the President to expend out of a 500-million-dollar appropriation "such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways * * *." Federal Control Act of 1918, Section 6, 40 Stat. 451, 455.

In the latter part of 1918 the Railroad Administration inaugurated a federal barge service on the Mississippi. Port-to-port barge rates were fixed at 80 percent of the corresponding all-rail rates in order to make the slower, more hazardous and otherwise inferior mode of transportation attractive to shippers (R. 21, 24). When the first joint rail-barge rates were established by the Director General of Railroads in the same year, the 20 percent differential was made applicable to them also, with the barge line receiving the differentially lower division for its portion of the transportation. A limited number of joint rates were established on this basis in 1919 and 1920 (R. 24–25).

When wartime control over railroad transportation facilities was brought to an end by the

Transportation Act of 1920, 41 Stat. 456, it was provided that the experiment in federal barge operation should continue. That Act declared it to be the "policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation" (Section 500, 41 Stat. 499). The water transportation facilities acquired by the United States were turned over to the Secretary of War who was directed (Section 201, 41 Stat. 458):

> [to] operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued * * *.

The directive to the Secretary of War reflects the congressional desire to encourage interchange of traffic between water carriers and rail carriers. The Secretary was (Section 500, 41 Stat. 499):

> to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, * * * *with a view to devising the types most appropriate* for different locations, and *for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail;* * * * to investigate

> the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and *whether the water carriers utilizing such waterways are interchanging traffic with the railroads;* * * *. [Emphasis supplied.]

In 1924 the Government barge operations, which are carried on under the name of "Federal Barge Lines," were turned over to Inland Waterways Corporation, a government corporation created for the purpose, which was to be supervised by the Secretary of War.[4] Inland Waterways Corporation Act, 43 Stat. 360. The Act specifically required the Corporation to continue to carry out the policies laid down in the Transportation Act of 1920. From 1920 to 1927 efforts were made by Federal to establish through routes and joint rates both by voluntary arrangements with rail carriers, and by proceedings before the Commission (R. 25–26).[5] There was much dissatisfaction upon the part of the advocates of water transportation with the results of these efforts (R. 26) and in 1928, in response to this criticism, Congress passed the Denison Act (Act

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[4] In 1939 the corporation was transferred to the Department of Commerce where it has remained (R. 21).

[5] E. g., *United States War Dept.* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, 92 I. C. C. 528.

of May 29, 1928, 45 Stat. 978) which amended the Inland Waterways Corporation Act.

The Denison Act declared it to be the "policy of Congress to continue the transportation services" of federal barge lines until, *inter alia,* "terminal facilities shall have been provided * * * reasonably adequate for joint rail and water service" and "there shall have been *published and filed* * * * such joint tariffs with rail carriers *as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers*" (45 Stat. 979). [Emphasis supplied.] The Act required the Commission to grant certificates of public convenience and necessity to barge carriers, and to direct all connecting common carriers and their connections to join with certificated water carriers in through routes and joint rates. The Commission was directed to "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service" (45 Stat. 980). The purpose and policy of these provisions have been described by this Court (*United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 462) as follows:

> The provisions * * * with which we are dealing were enacted by Congress in an avowed effort to bring about cooperation on the part of the rail carriers with the water carriers. The report of the House Committee on the proposed legislation (H. Rept. 1537, 70th Cong., 1st Sess., pp. 5–6)

> recites the necessity of overcoming opposition on the part of the rail carriers in respect of through routes, joint rates, etc., without interminable delay and the heavy expense necessary to carry on proceedings before the Interstate Commerce Commission, as a necessary prerequisite to the realization of privately owned transportation service on the inland waterways of the country.

Federal promptly applied under the new Act for an order requiring establishment of additional through routes and joint rates (R. 27). And the Commission directed connecting rail lines to join in such through routes and joint rates except where the rail-barge through routes would result in undue circuity as compared with the all-rail routes (R. 27–28). The Commission, in establishing the basis for the joint rates, adopted the 20 percent differential which had previously been used by Federal except that where the water leg of the route was particularly short as compared to the rail leg, the prescribed differential was reduced to 10 percent (R. 28).[6] Similar orders were subsequently issued with respect to the applications of Valley and American (R. 29).[7]

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[6] *Ex Parte No. 96*, 153 I. C. C. 129. It is evident that if the flat 20 percent differential were applied where the water leg is very short, the results would be incongruous since 20 percent of the entire all-rail rate is deducted from the division received by the barge line.

[7] *Application of Mississippi Valley Barge Line Company*, 167 I. C. C. 41; *Application of American Barge Line Company*, 182 I. C. C. 521.

The final legislative development occurred with the passage of the Transportation Act of 1940, 54 Stat. 898. Under this Act water carriers were brought under the general scheme of regulation of the Interstate Commerce Act. The sections of the Denison Act providing for establishment of joint through rates and rate differentials were replaced by the present Section 307 (d) of the Interstate Commerce Act. This section, in authorizing the establishment of through routes and joint rates by the Commission, requires the Commission to prescribe "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The Transportation Act of 1940 was passed in an atmosphere of suspicion on the part of the advocates of water transportation because of fears that the natural advantages of such transportation might be prejudiced under regulation by a Commission whose previous primary concern had been railroads. See *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 574–76. To allay such general fears, and the specific fear that water carriers would be compelled to raise their rates to such an extent as to eliminate effective competition with railroads, Congress included in such Act a number of provisions which are considered in detail, *infra.*

The Present Proceedings

The proceedings culminating in the present order of the Interstate Commerce Commission began in 1934. The Commission then had pending before it the complaints of certain rail carriers attacking various joint rates prescribed by the Commission under the Denison Act.[8] On October 8, 1934, the Commission on its own motion ordered a general investigation into the reasonableness of existing through routes and joint rates (and the need for additional routes) for rail-barge transportation on the Mississippi and Warrior Rivers and their tributaries, and the reasonableness of the existing minimum differentials between such rates and all-rail rates between the same points. At the same time the Commission reopened certain rate proceedings based upon complaints by Inland Waterways Corporation and its predecessor, the War Department. The rail carriers' complaints and those of Inland Waterways were consolidated with the Commission's general investigation for hearing (R. 18–20, 78–80).

Extensive hearings were held before a commissioner and an examiner, and full argument was had before the Commission itself. On July 7, 1948, the Commission issued a comprehensive report summarizing the voluminous evidence,[9]

[8] Act of May 29, 1928, 45 Stat. 978, repealed in 1940 by the Transportation Act of 1940, 54 Stat. 898, 950.

[9] The record of the proceedings comprises some 16,000 pages of testimony and over 1,500 exhibits.

analyzing the issues presented, and stating its findings and conclusions (R. 16). The Commission found that, generally speaking, almost all points in the United States east of the Rocky Mountains presently have some "two-way rates" [10] available to them and that "from the standpoint of practicality the present structure of joint rates by and large is a fairly satisfactory product of an evolutionary process" (R. 44).

The Commission considered in detail the railroads' objections to the continuation of differentials based upon their assertion that all-rail costs are now lower than rail-barge costs. The Commission rejected the cost studies in support of this assertion, principally on the ground that they related to a period now long past (1933 to 1938), and that substantial changes have occurred with respect to the transportation conditions of both railroads and barge lines since that time (R. 33). The Commission stated that "No useful purpose would be served by reviewing these criticisms [directed against the cost studies] with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail" (R. 33). The Commission then reviewed some of the changes which have occurred

[10] *I. e.*, barge-rail or rail-barge rates. All such joint rates are herein referred to as rail-barge rates.

in the conditions affecting costs of barge operation and concluded that (R. 36)—

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials.

The Commission therefore made no finding as to the present relation of rail-barge costs to all-rail costs.

The Commission reviewed the evidence of shippers indicating that barge transportation is regarded as inferior to rail transportation and will, therefore, be selected by shippers only when there is a rate advantage in doing so (R. 38–39). The Commission said (R. 39):

> The shippers' evidence is chiefly of significance because it indicates a fairly unanimous view that the principal object in shipping by barge is to save transportation expense.

In the light of this evidence as to the crucial effect of relative rates, the Commission considered the Congressional policy reflected in the Interstate Commerce Act, the Inland Waterways Act, and the extensive investments made by the United States in barge and terminal facilities for the purpose of developing an efficient and economical rail-barge service. It noted that Congressional encour-

agement of barge transportation had persisted despite the deficit basis upon which Federal Barge Lines had been operating (R. 42):

> In the past several years Federal has received continuing consideration by congressional committees on appropriations as well as others. It definitely appears from that consideration that Federal is deemed to be performing a pioneering function for the purpose among others of demonstrating the advantages of joint barge-and-rail transportation in the belief that such service eventually will prove to be economical.

On the basis of the entire evidence before it the Commission concluded that "joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified" (R. 44). In prescribing the precise differentials to be established the Commission followed, with modifications, the general outline of proposals submitted by the barge lines which were based upon a "relative level of rates necessary to cover full costs, including a return on investment, for the barge portion of the through haul, and *to provide for the rail portion of the through haul revenues as great as if the traffic were transported all rail*" (R. 46; emphasis supplied). In other words, the entire burden of the differentials is to be borne by the barge lines; the connecting rail carriers re-

ceive substantially the same division as for the corresponding portion of all-rail service. And the differentials set forth in the order with respect to "class" rates[11] represent merely an extension, with modifications, of the prevailing pattern established by voluntary action or previously prescribed by the Commission. The differentials are stated in cents per hundred pounds, and are to be deducted from present first class all-rail rates (R. 51, 55–74). Thus subsequent changes in all-rail rates would have no automatic effect on rail-barge rates.

The Commission concluded that, in general, commodity rates should be handled in the same manner as class rates (R. 49), except that no joint rates were prescribed for bulk commodities.[12] It noted, however, that in certain situations exceptions would be desirable with respect to specific commodities, and that adjustments should be made with respect to competitive relationships between ports. Thus it was provided that existing rail-barge rates on sugar should remain undis-

[11] For definitions of "class rates" and the other types of rates used, see *New York* v. *United States*, 331 U. S. 284, 291.

[12] In this connection the Commission stated (R. 50):

"Bulk commodities are largely handled in all-water service or on combination rates not under a common arrangement for through carriage, for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore interior points generally do not have facilities for handling such large consignments. For that reason we shall not prescribe through routes and joint rates on bulk commodities."

turbed, and it was specified that the Commission would "not require the establishment of barge-and-rail commodity rates from New Orleans to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such destination from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans" (R. 52).[13]

In view of the complexity of the transportation problems and conditions involved in joint routes, based upon consideration of many factors, the Commission recognized that some modifications in the schedule of prescribed differentials might become necessary as the routes were established. Accordingly, it deferred the issuance of a formal order in the hope that the rail carriers and water carriers could work out voluntarily a system of differentials substantially along the lines suggested in the Commission's report (R. 50–52). The railroads declined to enter such arrangements (R. 75). On June 13, 1949, the Commission issued a supplemental report making slight modifications in its findings, and at the same time issued its order requiring establishment of the specified through routes and joint rates (R. 75, 14).

[13] This proviso was subsequently expanded to cover transportation to or from New Orleans (R. 77).

On September 20, 1949, the present action was instituted by the rail carriers (appellants in No. 45) to enjoin the enforcement of the Commission's order (R. 1). The principal attack upon the legality of the order was based on the fact that the Commission did not find that the rail-barge costs of transportation are lower than corresponding all-rail costs. On January 12, 1950, the court below unanimously upheld the validity of the order as supported by substantial evidence and in accord with statutory authority (R. 173, 189). The opinion of the three-judge district court (by Lindley, J.) answered the principal contention of appellants as follows (R. 178):

> In the instant case, assuming that the operating *costs* of the railroads are less than those of the barge lines, it does not follow that joint barge-rail *rates* should be equal to or greater than all-rail rates, for so to hold would be utterly to disregard the relative values of the respective services and, incidentally, to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service. [Emphasis supplied.]

SUMMARY OF ARGUMENT

I

The rate differentials prescribed by the Commission are fully justified under the statutory

standards, and are reasonable. The Commission, in arriving at its expert judgment, has carefully considered all material evidence presented in this voluminous record. It has taken into consideration the value of the respective services to shippers, the effects of rates upon traffic, applicable congressional policy, and all other relevant matters. It has excluded relative transportation costs from consideration because of the inconclusive state of the record with respect to such costs. The attack of appellant-railroads on the order is grounded on the untenable hypothesis that differentials can be justified only if there is an affirmative finding that rail-barge costs of transportation are lower than corresponding all-rail costs. There is no basis in the statute or decisions for such a restrictive rule of rate making.

The argument of appellants that the assertedly lower all-rail costs are an "inherent advantage" of rail transportation which must be reflected in the rate structure cannot be sustained either factually or legally. The Commission and the court below have correctly concluded that the record fails to establish that present all-rail costs are lower than rail-barge costs. And there is no basis in law for the contention that barge rates must be kept artificially high to protect railroads from competition. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282.

II

The rate differentials here prescribed do not create unlawful or unconstitutional discriminations against particular ports or shippers. The attack of the intervening shipper and port interests upon the order falls with the attack of the railroads. Geographical advantages do not constitute an undue preference. Rates otherwise lawful are not either unconstitutional (*Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125) or unlawful as a discrimination (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46) merely because shippers or ports which are favorably situated receive benefits from the rates not available to others.

ARGUMENT

I

THE RATE DIFFERENTIALS PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION ARE REASONABLE AND FULLY JUSTIFIED UNDER THE APPLICABLE STATUTORY STANDARDS

Introduction

Appellants are assailing an order of the Interstate Commerce Commission in the exercise of its delegated legislative function in the realm of rate-making which, as this Court has said, "calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to perform." *Missis-*

sippi Valley Barge Co. v. *United States,* 292 U. S. 282, 286. And the particular exercise of expert judgment here has been reviewed and unanimously approved by the three judges sitting in the court below.

Of all rate-making problems, that of adjustment of rate relationships involving competing modes of transportation is among the most difficult. The Transportation Act of 1940 places upon the Commission the responsibility for fixing those relationships in accordance with statutory standards. No single standard is supplied. The National Transportation Policy, *infra,* p. 52, for example, requires "fair and impartial regulation of all modes of transportation," the preservation of the "inherent advantages" of each, the promotion of "safe, adequate, economical and efficient service," and the regulation of rate structures so as to prevent "unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." The Commission's efforts are to be directed "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

The Commission in the instant cases has carefully followed the National Transportation Policy and specific statutory standards in determining

that differentials between rail-barge rates and all-rail rates are "justified" (Section 307 (d)) and in prescribing "reasonable" differentials (*ibid.*). See R. 44, 51–52. It has exhaustively considered the entire joint rate structure and its history and all the evidence presented, including that relating to costs, value of the services to shippers, effect of differentials upon traffic, the willingness of the barge lines to accept the lower rates and absorb the differentials, the history of existing structure in practice, and the congressional policy of encouragement of joint rail-barge traffic. The court below rightly concluded (R. 180–181) that "the Commission, far from acting arbitrarily, fixed the differentials only after due consideration of all the relevant factors and evidence, and that they are the product of the Commission's expert, informed judgment on the subject."

Appellants challenge the Commission's bases of decision. They contend, notwithstanding that the Commission did not so find, that the costs of furnishing transportation via all-rail routes are lower than costs over rail-barge routes between the same origins and destinations. With this contention as a premise, appellants argue that the Commission has unlawfully destroyed an "inherent advantage" of rail transportation by permitting the water carriers to charge lower rates than those charged for rail service. These contentions of appellants are met at the outset with

the fact that the Commission did not, and on the basis of this record properly could not, find that all-rail costs are lower than rail-barge costs (*supra*, p. 14). Appellants are therefore forced to argue that differentials cannot lawfully be prescribed here because there is no affirmative finding that rail-barge costs are lower. In other words, appellants must and do argue that lower transportation costs are, as a matter of law, a *sine qua non* to a conclusion that differentials are justified. We propose to demonstrate that there is no basis in the statute, its legislative history, or decided cases, for this arbitrary singling out as controlling of one factor among the many factors which go into rate-making.

It is also essential to a proper appraisal of these cases to recognize that they do not involve the imposition of rates upon rail carriers which those carriers assert are too low, or confiscatory. In fact they do not involve the fixing of rail rates at all. Appellant rail carriers are required by the order here challenged to maintain joint rates with water carriers but they are not required to accept as their division of such rates any less than they receive as a division of the all-rail rates between the same points. What the railroads are objecting to is competition—not the imposition of rates upon them. This fact is made very clear in the railroad-appellants' brief in this Court. They say (Br. 52):

> *It is not the rail lines with which the barge lines connect, but those with which they are competitive, which are here complaining.* The question here is whether a barge-rail route as a whole shall have an unjustified rate advantage over an all-rail route and thereby divert traffic not from the rail carrier with which the barge line connects, but from the rail carrier with which it competes, although in certain instances, the rail carrier with which the barge line competes may be the same carrier with which it connects. [Emphasis supplied.]

Moreover, the differentials prescribed by the Commission are *fixed*, i. e., any changes made in the all-rail rates would not automatically change the rail-barge rates. Although this order is based upon the present level of rail rates, it does not require the rail carriers to maintain that level. The Commission has neither inquired into nor reached any conclusions in the present proceeding with respect to the reasonableness of existing rail rates. It has simply determined that differentials between present all-rail rates and rail-barge rates are justified because, among other things, of the lower value of barge services, and the willingness of the barge lines to furnish such services at a cost to shippers lower than the rail rate. And the differentials which were prescribed were substantially as proposed by the barge lines, and were

designed to establish a level of rates which would compensate the barge lines and provide a return upon investment.

The railroad-appellants seek to establish the principle that, as a matter of law, they are entitled to protection, under the guise of preservation of "inherent advantages", from the legitimate competition of barge lines. The railroads make the curious argument that because they render a "superior" service costing less than the "inferior" service provided by the barge lines, the Interstate Commerce Commission must forbid the barge lines to compete with the railroads by charging a lower rate for barge transportation—in other words, the Commission must keep the rail-barge rates as high as the all-rail rates in order not to deprive the railroads of their "inherent advantages of lower cost of service and superiority of service" (Railroad-appellants' Brief, p. 17). This reduces itself to a contention that the shippers and consuming public should not be allowed to obtain the inferior barge service for less, even though the barge lines are willing to receive less.

The railroads have made no contention in this proceeding that, in view of their lower operating costs, the all-rail rates should be reduced to meet the competitive rail-barge rates. If the railroads were complaining that the Commission's order compelled them to maintain all-rail rates at an

artificial, uneconomic, unduly high level in order to give the barge lines a competitive advantage, the case would assume an entirely different aspect. But the railroads desire to eliminate the differentials not by reducing the all-rail rates but by increasing the rail-barge rates. And that is a crucial fact in this case. As the district court pointed out in its opinion (R. 179): "Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor."

A recent statement of this Court is particularly pertinent in the present case. In *Ayrshire Collieries Corp.* v. *United States,* 335 U. S. 573, 592–593, it was said:

> Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and

competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See *Board of Trade* v. *United States,* 314 U. S. 534, 548; *New York* v. *United States,* 331 U. S. 284, 347–349.

A. *The statutory standards*

Section 307 (d) of the Interstate Commerce Act empowers the Commission to establish through routes and joint rates applicable to transportation of property by common carriers by rail and water. And the Commission is required to prescribe "such reasonable differentials as it may find to be justified" between all-rail rates and joint rail-barge rates. The differentials here found by the Commission to be justified were the product of one of the most painstaking investigations ever undertaken by it. In reaching its conclusions the Commission gave full scope both to the specific statutory standards, and to

the broad objectives embodied in the National Transportation Policy.

The specific standards applicable to water carrier rates are found in Sections 307 and 305 of the Act. Section 307 (d), which authorizes joint through rates and reasonable differentials, merely requires that differentials be "justified." Section 307 (f) requires the Commission, in fixing rates for water carriers, to "give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed." The reports of the Commission show clearly that it fully considered such effects. Indeed, one of the principal reasons given by the Commission for the establishment of differentials was that they are essential to the maintenance of rail-barge traffic.

The second requirement of Section 307 (f) is that the Commission shall give consideration to the "need, in the public interest, of adequate and efficient water transportation service at the *lowest cost consistent with the furnishing of such service;* and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service." [Emphasis supplied.] The differentials here prescribed were carefully designed to produce a return to the barge lines sufficient to cover costs, and a return on investment. As previously stated

(pp. 15-16), the differentials fixed by the Commission were substantially as proposed by the barge lines, and have not been challenged by them at any stage of this proceeding. Appellants, in attacking those differentials, are seeking to have water rates established which are higher than the "lowest cost" to the public consistent with the furnishing of efficient water service.

Section 305 (c) contains the usual prohibition against undue preferences and unjust discriminations by water carriers. But it also contains the significant proviso that:

> Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Plainly Congress would not have so provided if it had intended that voluntary rates of water carriers should be tested for validity against corresponding rail rates. If the Commission were to be required to establish water and rail rate relationships on the basis of relative costs, it is obvious that Section 305 (c) would never have been enacted. The provision lays down the rule that water rates are not to be tested for validity

against rail rates.[14] Yet this is precisely what appellants seek to do here with respect to the water portion of rail-barge rates.

The Commission in the instant cases has fully adhered to the requirements of the National Transportation Policy. The objective of the Act is there stated to be one of developing, coordinating, and preserving an adequate national transportation system by water, highway, and rail, as well as other means. To achieve this objective the Policy requires that the Act be administered so as to recognize and preserve the "inherent advantages" of each form of transportation and to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers. The order carries out the mandate[15] of

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[14] Of this provision the House Conferees, in a statement accompanying the conference report on the bill (S. 2009) which became the Transportation Act of 1940, said (86 Cong. Rec. 10172):

"Outside of special provisions designed to protect water carriers the rule of reasonable rates in itself prohibits the imposition of an unreasonably high rate for any carrier for the purpose of aiding a competitive carrier. There is no authority for the contention that the Commission has any right to require a rate higher than is reasonable for the purpose of diverting traffic from any given type of carrier to a competitor."

[15] The Policy is not a mere technical preamble to the Act. It ends with the injunction that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." See 84 Cong. Rec. 9861-6; *McLean Trucking Co.* v. *United States*, 321 U. S.

the Policy by establishing rates which will make it possible for barge lines to continue to perform the useful function of providing inexpensive service to the shippers on through routes. The Commission has refused to sound the death knell of rail-barge transportation by requiring parity of rates for services which, though competitive, are economically unequal.

The duty of the Commission to encourage and preserve interchange traffic among rail and water carriers finds independent statutory support outside of the Interstate Commerce Act. As the Commission pointed out in its Report (R. 40), Section 3 (c) of the Inland Waterways Corporation Act as amended by the Denison Act proclaims it to be the policy of Congress to continue federal operation until, *inter alia,* "there shall have been published and filed * * * such joint tariffs with rail carriers as *shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers*" (45 Stat. 978; emphasis supplied). It is obvious that the Commission correctly treated the duty to make such services "generally available" as a duty to make them available upon terms reasonably calculated to be

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67, 82–84; *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U. S. 194, 206; *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 616–617; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 576.

useful to shippers, *i. e.*, at rates which would make the inferior rail-barge service attractive. At the same time the Commission carefully preserved to the connecting rail carriers the division received by them for the corresponding portion of all-rail service.

Appellants assert that the Commission's order is based solely on its interpretation of congressional policy, and they contend that this is not a proper basis for rate-making (Railroad-Appellants' Br. 23–28). In the first place, as the district court pointed out (R. 179–180), although the Commission relied upon congressional policy, it by no means rested its conclusions exclusively upon such policy. The report of the Commission heavily stresses the value of the respective services to shippers and the effects of differentials upon traffic (R. 39–44). The particular differentials prescribed are based upon the Commission's detailed analysis of all the evidence, including the proposals made by the barge lines and the criticisms of those proposals by the appellants (R. 44–51).

In the second place, the Commission did not look to congressional policy to the exclusion of the substantive statutory provisions. True, it reviewed the history of the development of inland water transportation and the substantial part played by Congress in that development. And it considered that a congressionally sponsored experiment in integrating inland water transporta-

tion with the national transportation system should not be brought to an end by imposing rates upon the water carriers so high as to prevent them from getting any interchange traffic. It would hardly seem that the Commission is to be criticized for weighing these factors. On the contrary, it would be most remiss in its duty if it did not. In interpreting the injunction of the National Transportation Policy to administer the Act to the end of "developing, coordinating, and preserving a national transportation system by water, highway, and rail" the Commission is required to make broad policy judgments which involve estimates of future needs and future developments. Surely, in arriving at an informed judgment the Commission was entitled to consider the reiterated congressional determination that barge line operations and interchange of traffic should be encouraged. The Commission rightly refused to interpret its duty to maintain the "inherent advantages" of rail carriers as an obligation to maintain barge rates at an artificially high level and thus, by relieving the railroads of effective competition, to bring rail-barge traffic to an end.

Appellants rely upon *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, and *United States* v. *New York Central R. R.,* 263 U. S. 603, in support of the contention that congressional policy must not be substituted for applicable statutory

provisions in arriving at rate orders under the Interstate Commerce Act. Those cases are clearly not in point here. As has been shown, the Commission has given the fullest consideration to the applicable statutory standards and to all the evidence offered before it. Certainly these cases do not require that the Commission ignore the expressed indications of the policy of Congress to preserve the ability of water carriers to charge low rates. In *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 574–575, this Court held in the plainest terms that this intention of Congress, reflected in the statute and its legislative history, is a guidepost in the interpretation of the provisions of the Act concerning intercarrier relationships which must not be disregarded.

B *Significance of relative transportation costs*

Appellants point to the National Transportation Policy and legislative history indicating that Congress was concerned with the preservation of the inherent advantages of forms of transportation other than water, and that the Commission is specifically required to provide impartial regulation of all modes of transportation. They argue that the allegedly lower all-rail costs create an "inherent advantage" of which the instant order deprives them, and that the lack of an affirmative finding by the Commission that rail-barge opera-

tions are demonstrably more economical than all-rail operations destroys the validity of the order. Apart from the fact that the order has no direct operation on all-rail rates, and therefore does not prevent the railroads from protecting their competitive position by seeking to lower such rates (see pp. 24–26, *supra,* and 40–47, *infra*), the difficulty with this argument is that it assumes that costs to the *carrier* is the sole and controlling factor in rate-making. The argument seems to ignore entirely the relevance of costs to the shippers and the consuming public.

The pertinent statutory provisions show that far from making relative costs of rail and water carriers the sole or controlling consideration in establishing joint rates, the statute makes no mention of such a consideration. The statutory standards with reference to water rates generally look in the opposite direction. Indeed a proposed provision [16] (in the bill which became the Transportation Act of 1940) which would have *precluded* reduction of rates below costs was deleted

[16] "In order that the public at large may enjoy the benefit and economy afforded by each type of transportation, the Commission shall permit each type of carrier or carriers to reduce rates so long as such rates maintain a compensatory return to the carrier or carriers after taking into consideration overhead and all other elements entering into the cost to the carrier or carriers for the service rendered: *Provided*, That nothing in this paragraph shall be construed so as to affect the long- and short-haul provision of section 4." [86 Cong. Rec. 10172.]

in conference. The conferees stated (86 Cong. Rec. 10172):

> It will be observed that this amendment restricts any type of carrier from reducing its rates below an amount sufficient to cover its overhead and other elements of cost for the service rendered, including a compensatory return. This compels the carrier to charge a higher rate than is commonly imposed for carrying a great percentage of all freight by land and water in domestic commerce. The immediate effect of this amendment, if enforced, would be to compel an increase of rates on a large part of the freight now carried by ships, highway, and rails.
>
> Everywhere in the world transportation rates take into consideration the class of traffic carried and at what rate it will move. Raw materials such as grains, farm products, coal, and other heavy materials frequently move at a rate less than required by this provision. Low-profit freight compensates for its carriage, but ordinarily the carrier could not successfully continue in business on low-cost freight alone. It is the greater profit made on high-class freight that makes the maintenance of our low-cost transportation system possible.
>
> At the present time about 100 railroads are under the protection of the courts because their revenues do not meet their expenses. This proposed amendment might drive these lines out of existence if enforced against them because it would

force their rates to a higher level and would transfer the business to their competitors.

This proposed amendment, if enacted, would impose numerous administrative difficulties; for instance, establishment of a permissible rate on a given product would require the production of evidence to show from the whole income and expense accounts of the carrier what rate would be required to meet the standard of rate making this amendment would establish.

Such an amendment would place its greatest burdens on the transportation of heavy freight such as farmers' products and would cause an unwarranted increase in freight rates which would be highly detrimental to our transportation system.

Again, the express proviso in Section 305 (c) that water rates shall not be deemed discriminatory, or to involve an unfair competitive practice by reason of differences between them and rail rates, is irreconcilable with the contention that relative costs should control. Finally, the provisions of Section 307 (h) strongly imply rejection of any consideration of relative costs as between water carriers and rail carriers. That section provides for the establishment of minimum rates for contract water carriers in certain instances. The Commission is required not to set the minimum rates for any contract water carrier in a manner that will improperly prejudice or disadvantage any other *water* carrier, and the Commission is required to consider the relative costs of the

two carriers. The failure to mention rail carriers is significant as showing that Congress had no thought of governing water rates by relationships between water costs and rail costs.

Baldly stated, the relative costs argument is that rates for an inferior service must equal rates for a superior service unless the transportation costs of the inferior service are lower. In other words, a service is to be priced in total disregard of its value to the consumer; and the consumer must pay just as much for an inferior service as for a superior service, simply because there is no showing that it costs less to furnish the inferior service. The district court succinctly answered this contention (R. 178):

> And finally, plaintiffs' insistence that lower costs are essential to the existence of differentials completely ignores one of the fundamental principles of economics, namely, that the price of a product or a service is determined by its *value* to the consumer. Of course, operating costs incidentally affect the price by establishing a level below which the price cannot be allowed to fall, but, above that level, it is the value to the consumer which finally determines what the price will be.

The fundamental principle of economics to which the court below adverted is especially important here. On the basis of the evidence in this record the Commission and the three judges of the court below concluded that to require parity of rates

would be, as the court put it, "to end effectively all joint barge-rail traffic, since that traffic depends on the existence of rates differentially lower than those charged by the railroads, which provide to the shipper a far superior service" (R. 178).

The rule that costs should constitute the controlling factor in rate making would wreak havoc with the entire existing structure of rail rates throughout the country. The decisions of this Court and the Commission have repeatedly rejected such a suggestion.[17] Appellants' reliance (Br. 35 *et seq.*) upon *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, is misplaced. This Court there held that rail carriers could not discriminate between ex-barge grain and ex-rail grain by charging higher rates for carrying the former, and that while a possible justification for differences in rates charged for these services would be a difference in transportation costs, the latter was not found by the Commission.

[17] See *New York* v. *United States,* 331 U. S. 284, 331; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 359; *Louisiana Public Service Commission* v. *Texas & New Orleans R. Co.,* 284 U. S. 125, 132; *Charges for Protective Service to Perishable Freight,* 241 I. C. C. 503, 510–511; *Proposed Lake Erie-Ohio River Canal,* 235 I. C. C. 753, 761; *Lighterage Cases,* 203 I. C. C. 481, 510; *West Coast Lumbermen's Assn.* v. *Akron, C. & Y. Ry. Co.,* 183 I. C. C. 191, 198–199; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.,* 159 I. C. C. 691, 696–697. And see *Federal Power Commission* v. *Hope Gas Co.,* 320 U. S. 591, 602, for a clear-cut rejection of the contention that any one factor can be controlling in rate-making.

Plainly the *Mechling* situation is not comparable to that here. There, the question was discrimination by a carrier in rates charged to two shippers for an identical service. Here, the question is whether barge lines must charge the same rates as railroads for different services. In *Mechling,* the rail carriers were attempting to discriminate against ex-barge traffic in violation of specific provisions of the Act. The only "discrimination" here arises from differences between rail rates and barge rates, and Section 305 (c), *infra,* p. 53, explicitly declares that such differences shall not constitute an unlawful discrimination.

C. *The basis of the rail carriers' attack upon the order*

Appellants treat the instant order of the Interstate Commerce Commission as though it prescribed rates for transportation by rail between certain points, and lower rates for transportation by water between the same points. The entire structure of their argument is built upon this assumption. In fact, however, the order does not alter existing all-rail rates, and the new rail-barge rates are based on existing all-rail rates. The differentials prescribed in the order are deducted from the barge division of the through rates. Hence the rates under attack are designed to and will give the rail carriers substantially the same division of rail-barge rates as they now receive from the corresponding leg of all-rail routes.

The apparent misconception of appellants as to the effect of the Commission's order is reflected in their reliance on *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282. They correctly point out that this case stands for the proposition that a carrier cannot be required to maintain unreasonably high rates for the benefit of its competitors. But the rail carriers here do not complain that they are being compelled to maintain unreasonably high rates. In fact, as has been pointed out, the order of investigation does not embrace all-rail rates and the order here challenged does not purport to pass on the reasonableness of existing all-rail rates. The order operates upon appellant rail carriers directly since it requires them to establish joint through routes with water carriers. But appellants are not contesting the order because of its effect upon the rail carriers participating in the joint rates, but because of its effect upon the rail lines with which barge lines are competitive (Railroad-Appellants' Br. 37, 52). We are dealing here with through rates which involve rail as well as barge rates, but the controversy does not concern the reasonableness of all-rail rates, or of the rail division of rail-barge rates. The real dispute, as appellants concede, is over the rates to be charged and received by their competitors, the barge lines, for the barge leg of rail-barge routes. In this respect, the issue here is the same

as that in *Mississippi Valley Barge Line Co.* v. *United States, supra,* except that here the shoe is on the other foot. There, the barge lines protested rate reductions by rail carriers because of the adverse competitive effect it would have on the barge lines' traffic. And this Court rejected the suggestion that "carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water" (292 U. S. at 288).[18]

Even if we were to assume with appellants (contrary to the findings of the Commission approved by the district court) that it has been affirmatively established that all-rail transportation costs are lower than rail-barge transportation costs, it does not follow either that the Commission violated the law in issuing this order, or that appellants have suffered any legal injury from the order. The Commission established the joint rate schedule on the premise that if the barge lines perform the service involved in the barge leg of the proposed rail-barge routes at rates based upon the prescribed differentials, the compensation received

[18] The Court implied doubt as to the standing of a competing carrier to attack a rate order not operating directly on it (292 U. S. at 289). And see *Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249. In principle there is the same doubt where, as here, a carrier subject to a joint rate order attacks a part of the order which does not affect its rates directly but only the rates of a competitor. See brief for appellee barge lines, Point I.

will cover their costs and yield a return on investment (*supra*, p. 15). As the court below held (R. 178–179), the rail carriers may not be heard to demand more. If transportation conditions have changed, or should change in the future, so that the rates for the water legs of joint routes are not compensatory, any or all of the carriers here involved are free to go to the Commission for relief.

The right of a mode of transportation to have its "inherent advantages" preserved is not a right to be free from reasonable rate competition from other modes of transportation. If barge rates are set at compensatory levels, as they have been here, the remedy for the railroads in order to meet such competition would appear to be to improve their service or lower their rates, or both—and not, as appears to be the case here, to seek to compel their competitors to raise *their* rates. The Commission has not passed upon the question of what, if any, differentials would be prescribed in the event that *all-rail rates* should be lowered to equal *rail-barge costs*.[19] As the opinion of the court below points out (R. 179):

[19] That issue is not here presented. But the *power* of the Commission to permit carriers to charge rates below costs in appropriate circumstances cannot seriously be questioned in view of the legislative history of the Act showing that a provision denying such power was deleted in conference (*supra*, pp. 36–37). As an abstract proposition, it might seem anomalous for a carrier to complain of a competitor's willingness to accept a lower rate which does not compensate the latter for its operating costs.

> Only when the rates charged by the railroads are so low that joint barge-rail freight cannot be transported profitably at a lower rate—i. e., when barge-rail operating costs approach all-rail rates—will there be reason to deny the inferior service the right to exist. In the joint rates established the railroads retain their regular rates; the differential between the all-rail rates and the rail-barge rates is absorbed by the barge lines.

The Commission has in effect followed the rule that if an inferior service believes it can profitably operate at rates lower than those charged for the superior service, the inferior service should be permitted the opportunity to do so. Indeed it has recognized that only on this basis can the carrier offering the inferior service hope to survive.

This would seem a reasonable principle of rate-making even in the absence of a legislative background reflecting a clear-cut congressional intention that water transportation—the inferior service—should be preserved and developed. This Court had occasion to review that legislative background in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574–577. The Court pointed out that there was much opposition to bringing water carriers under the jurisdiction of the Interstate Commerce Commission because of the fears of the champions of water transporta-

tion that "the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation" (330 U. S. at 575). To put these fears at rest, various provisions, reviewed above, were introduced "to protect the water carrier's natural advantages" (*id.* at 576).[20] Appellants seek to convert these provisions into a guarantee against rate competition by barge lines against rail carriers.

Appellants do not quarrel with the assertion that the references in the Transportation Act of 1940 to the preservation of the "inherent advantages" of various modes of transportation were introduced into that Act at the behest of the advocates of water transportation. But appellants say that both the statute as written and its legislative history reflect an intention on the part of Congress that the administration of the Act be impartial, and that the inherent advantages of *all* types of transportation shall be preserved. With this contention we agree, but we disagree with the contention that to preserve the inherent advantages of low-cost carriers—whether rail or water—the Commission is required to compel competing carriers to maintain artificially

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[20] See 84 Cong. Rec. 5873–5876, 5883, 6131. For an extensive review of the legislative history of these provisions see the brief for the United States in the *Mechling* case (O. T. 1946, No. 72), pp. 16–26.

high rates. *Mississippi Valley Barge Line* v. *United States, supra.*

If all-rail costs are actually lower than rail-barge costs, rail carriers would presumably be able to lower their rates below those which barge lines could afford to maintain. Appellants, however, do not seek to preserve their assumed inherent advantages by such a lowering of their rates. On the contrary, their position seems to be that their asserted low-cost position entitles them to keep their rates high and at the same time be protected from lower rates of barge lines. Neither the statute nor the legislative history referred to in appellants' briefs supports such a distortion of the concept of preservation of inherent advantages.

The district court aptly stated the extent of the rail carriers' interest in the rates fixed for the barge portions of the joint routes (R. 178–179):

> So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service.

Appellants suggest (Br. 44) that the operating deficits incurred by Federal somehow constitute a refutation of the Commission's premise, ac-

cepted by the district court, that the barge division of the proposed joint rates would be sufficient to cover barge costs and yield a return upon investment. But the record does not indicate, and the Commission did not find, that the cause of Federal's deficits was either the carrying of goods generally at less than cost or the handling of interchange traffic at rates below cost. We think that an examination into the history of Federal's operations would reveal that its deficits have resulted from its pioneering developmental work in areas in which private barge lines have been reluctant to operate. But in any event it is clear that there is no basis in this record for the inference that rail-barge rates have not been compensatory. Accordingly, the suggestion that Federal's deficits have any bearing upon the validity of the Commission's order is wholly unwarranted.

II

THE ORDER DOES NOT RESULT IN UNLAWFUL OR UNCONSTITUTIONAL DISCRIMINATIONS AGAINST PARTICULAR PORTS OR SHIPPERS

The assertion that the differentials here prescribed will unlawfully discriminate against ports and shippers who are not served by barge lines is completely without substance. As the court below noted (R. 183), if the differentials are otherwise lawful (as it held them to be), "then the contention that the order prescribes unreasonably low barge-rail rates or unduly prefers New Orleans

over Savannah and the Texas ports becomes, in effect, a complaint against any rate structure which provides to shippers who are in a position to transport their goods by water, rates which are lower than those available to shippers who are not so located." It is settled law that geographical advantages do not constitute an undue preference, nor is the Commission required to equalize them. In the leading case of *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 46, this Court, speaking through Mr. Justice Holmes, said, "The law does not attempt to equalize fortune, opportunities or abilities."

The constitutional argument is likewise without merit. Article I, Section 9, Clause 6 of the Constitution provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another * * *." As this Court pointed out in *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.,* 284 U. S. 125, 131:

> The clause of the Constitution invoked is: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and

> clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States.

Plainly, the rate differentials here do not prefer the ports of one state over another. If there is a preference here it is in favor of ports on inland waterways irrespective of in what state they happen to be located. In any event, as the district court noted (R. 184), "in this case, the preference of which the intervenors complain is not given by a regulation of commerce but by a favorable geographic location."

The Commission, in weighing the many relevant factors in rate-making, may of course consider the effects of changes in the rate structure upon localities and shippers. In the instant cases it did so. Thus, for example, the Commission noted that the "barge-and-rail rates on sugar have a vital relation to the general competitive relationships on sugar from all producing points to mid-western consuming points, and we consider it highly desirable that no change in sugar rates be made as a result of our findings here" (R. 49). Again, the Commission included in its findings (R. 52) a proviso that rail-barge commodity rates should not be required to be established

"from New Orleans to any destination which shall be lower than the rate on the same commodity from Houston or Galveston to such destination, where the short-line rail distance to such destination from Houston or Galveston is not greater than the short-line rail distance to the same destination from the port of interchange in the barge-and-rail route from New Orleans." And in its supplemental report the Commission broadened this proviso to apply to rates to New Orleans as a destination (R. 76).

Appellants ask this Court to substitute its judgment as to the relative weight to be attributed to various factors for the judgment of the Commission. It is a familiar rule that this Court will not assume such a function. As was stated in *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 536:

> The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that

has support in the record and the applicable law.

The Commission's judgment in the instant cases is fully supported by the record and the applicable law.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted.

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OCTOBER 1950.

APPENDIX

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, are as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. [49 U. S. C. preceding 1.]

* * * * *

SEC. 305. (c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act. [49 U. S. C. 905 (c).]

* * * * *

SEC. 307. (d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or

maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15. [49 U. S. C. 907 (d).]

* * * * *

(f) In the exercise of its power to prescribe just and reasonable rates, fares, and charges of common carriers by water, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient

water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service. [49 U. S. C. 907 (f).]

* * * * *

(h) Whenever, after hearing, upon complaint or its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by water, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by water subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts

complained of and the reasons for such complaint and shall be made under oath. [49 U. S. C. 907 (h).]

Section 3 (c) of the Inland Waterways Corporation Act, as amended by the Act of May 29, 1928 (Denison Act), 45 Stat. 978, provides as follows:

> (c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage, in common-carrier service on such rivers. [49 U. S. C. 153 (c).]

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OCTOBER TERM, A. D. 1950

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF AMERICAN BARGE LINE COMPANY, INLAND WATERWAYS CORPORATION AND MISSISSIPPI VALLEY BARGE LINE COMPANY, APPELLEES.

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OPINION BELOW

The opinion of the District Court for the Northern District of Illinois (R. 173) is reported in 88 F. Supp. 982. The reports of the Interstate Commerce Commission (R. 16, 75) appear in 270 I.C.C. 591, and 274 I.C.C. 229.

JURISDICTION

The final decree of the three-judge district court was entered on January 12, 1950 (R. 189). The petitions for appeal were presented and allowed on March 7, 1950 and March 10, 1950 (R. 190, 196, 198, 202, 203, 207, 208, 213). The jurisdiction of this Court is conferred by 28 U.S.C. 1253, 2101(b), and 2325. Probable jurisdiction was noted on May 15, 1950 (R. 460).

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act and of the Inland Waterways Corporation Act, are set forth in the Appendix, *infra*, pp. 42-50.

QUESTIONS PRESENTED

The appellants charge that the Interstate Commerce Commission exceeded its authority and failed to conform to statutory standards in issuing an order prescribing through routes and joint rates differentially lower than corresponding all-rail rates for the trans-

portation of property in through barge-rail service. The questions presented are:

1. Have the appellants an interest which entitles them to maintain their suit?

2. Does the Commission's order show on its face that it is based on a mistaken view of congressional policy and not on the standards of lawfulness provided by the Interstate Commerce Act as applied to the evidence before it?

3. May the Commission prescribe differential rates for barge-rail service without first finding that the cost of barge-rail service is less than the cost of all-rail service?

4. Does the report contain all findings necessary to support the order?

STATEMENT.

These are direct appeals from the judgment of a three-judge district court denying an injunction to restrain enforcement of an order of the Interstate Commerce Commission entered in *Rail and Barge Joint Rates*, No. 26712 on the Commission's docket, and cases consolidated therewith. The Commission proceedings embraced further hearings in complaint cases brought by the Inland Waterways Corporation, appellee, and its predecessor the Secretary of War, seeking through routes and joint differential rates with railroad connections[1] (R. 20), three complaints brought by railroads including the appellants in No. 45 against the through route and differential joint rate adjustments prescribed by the Commission in various orders entered in proceedings under the Denison Act of May 3, 1928 (45 Stat. 978)[2] (R. 19-21), and a general inves-

[1] I.C.C. No. 13290, *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I.C.C. 317, 92 I.C.C. 528; I.C.C. No. 18406, *Inland Waterways Corp.* v. *B., S. L. & W. Ry. Co.*, 142 I.C.C. 9; I.C.C. No. 19017, *Inland Waterways Corp.* v. *C. G. W. R.R. Co.*, 129 I.C.C. 521; and I.C.C. No. 19480, *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126. Reports of the Commission entered in these cases on various dates in 1923, 1924, 1927, 1928 and 1929, provide the basis for a substantial portion of the existing barge-rail differential adjustment.

[2] The reports in the Denison Act proceedings are as follows: *Through Routes and Joint Rates, Ex Parte No. 96* (1929), 153 I.C.C. 129, (1929) 156 I.C.C. 141, (1930) 161 I.C.C. 207, (1930) 163 I.C.C. 716, (1930) 167 I.C.C. 385, (1931) 172 I.C.C. 525, (1931) 174 I.C.C. 477, (1932) 181 I.C.C. 675, (1933) 192 I.C.C. 173, and (1933) 192 I.C.C. 663; *Application of Mississippi Valley B. L. Co., Ex Parte No. 99*, (1930) 167 I.C.C. 41, (1930) 171 I.C.C. 37, (1931) 178 I.C.C. 224, (1932) 182 I.C.C. 512, and (1932) 183 I.C.C. 503; and *Application of American B. L. Co., Ex Parte No. 102*, (1932) 182 I.C.C. 521, and (1932) 185 I.C.C. 483.

tigation instituted by the Commission's order of October 8, 1934 (R. 78-80). The issues raised in the collective proceedings reached the reasonableness and lawfulness otherwise of the existing differential joint barge-rail[3] rates and also the question of the necessity and reasonableness of additional routes and joint differential barge-rail rates.

The order of the Commission entered after an original report July 7, 1948, (R. 16-74) and a supplemental report of June 13, 1949, (R. 75-77) required the appellants in No. 45 and other common carriers by railroads to join appellee barge lines in through routes and joint rates, the latter to be determined by deducting specific differentials from the all-rail rates in effect between the same points (R. 55-74).

The Commission's order largely required revisions of existing barge-rail through routes and differential joint rates, rather than completely new routes and rates. Some routes and differential rates were prescribed where none are now maintained.

The existing adjustment came into being at various times after 1918, partly by voluntary action of interested railroads and barge lines, partly in conformity with suggestions and findings of the Commission in the cases cited in footnote 1 above, and in part in compliance with orders entered in the Denison Act proceedings cited in footnote 2 above.

The three barge line appellees are Inland Waterways Corporation, operating Federal Barge Lines (Federal),

---

[3] "Barge-rail" is used herein in the inclusive sense of covering all types of routes and differential rates prescribed, whether barge-rail, rail-barge, or rail-barge-rail.

American Barge Line Company (American), and Mississippi Valley Barge Line Company (Valley). These lines were respondents along with connecting rail lines in the Commission's general investigation, No. 26712. Collectively they operate barge services on the Mississippi River between the Twin Cities and New Orleans, on the Missouri River to Kansas City, on the Ohio River to Pittsburgh, and on the Warrior River system between New Orleans and Port Birmingham, Alabama. At various ports of interchange served by them these barge lines join with railroads in through routes and joint rates on a differential rate basis. They also conduct extensive port-to-port operations on a differential rate basis. The latter rates are not involved in these proceedings.

The proceedings and record before the Commission

Hearings in the Commission proceeding were had on various dates beginning in 1935, and extending to 1943. The record before the Commission includes more than 16,000 pages of transcript plus approximately 1,500 statistical exhibits. That part of the record was made in Exhibit No. 1 in the court below.[4]

In addition, annual reports to the Commission of the rail and the barge-line respondents in I.C.C. No. 26712, and the annual reports of Inland Waterways Corporation to the Secretary of War in the earlier years and to the Secretary of Commerce in later years were made a part of the Commission record by reference for the entire period up to the date of the Commission's decision.

---

[4] By stipulation Exhibit No. 1 is not printed. It is a part of the record here as an original exhibit.

Although appellants complained in the court below that the order of the Commission is without support in the evidence (R. 13) they rely entirely on the face of the Commission's report to support that allegation (Brief, appellants in No. 45, p. 9). Under these circumstances there is no need for appellees to summarize or for the Court to examine the evidence before the Commission. It must be accepted as sufficient unless the face of the report clearly discloses a lack of evidence on a matter as to which evidence is required as a matter of law.

The face of the Commission's report discloses that in determining the differentials found justified and reasonable by it, it gave consideration among other things to evidence dealing with the following matters:

The history of the operations of the three barge-line appellees, their equipment, frequency of service, ports served, tonnages handled, commodities transported, relative importance of the traffic involved (that interchanged with railroads) to the non-involved port-to-port traffic,[5] and operating income or deficits realized (R. 20-24);

The history and scope of the existing differential joint barge-rail adjustment, the relation of the differentials in the joint rate structure under review to differentials in the port-to-port structure which was not in issue, the basis for the existing differentials, dif-

[5] In 1947, the tons handled on joint rates with railroads when compared with total tons handled by the barge-line appellees appeared as follows: For Federal, 369,217 out of 2,154,412 tons; for Valley, 37,000 out of 2,076,470 tons; for American, 3,084 out of 1,385,666 tons. In earlier years, the joint traffic with railroads represented a larger share of the total. (R. 22, 23, 24)

ferences between the ports served as to the relative extent of the barge-rail rate structure provided therefor, and the limitations imposed by the Commission in prior cases on barge-rail routes and differentials so as to avoid wasteful transportation (R. 24-31);

The willingness of the railroads to join in through routes with barge lines if the joint rates maintained thereover were established on the all-rail basis (R. 31);

Studies relating to cost of service by rail and by barge in the period 1933-38, the restatement of such cost studies and the conclusions reached in regard thereto by the Cost Section on the staff of the Commission, and the radical changes in conditions affecting such cost studies which have been experienced since the cost study periods (R. 32-3);

Statements in 1947 by the Inland Waterways Corporation, its President, and the Under Secretary of Commerce as to the existing condition of Federal's equipment, its increased cost of labor, lack of prospects for profitable operations unless the line be rehabilitated, and the program then under way as to new and modern equipment and more efficient and economical terminal handling (R. 33-35);

The rising terminal costs encountered by other barge lines and the reduction in 1947 compared with 1941 in the joint traffic with railroads handled by Valley as result of certain embargoes placed by that line against the joint traffic[5] (R. 35,36);

[5] In the Commission's report dated July 7, 1948, (R. 35) and in the brief filed by appellant in No. 47 in opposition to the motion to affirm reference is made to an embargo declared by Mississippi Valley Barge Line Company against the handling of

The interest of shippers in barge-rail transportation, the evidence showing that the Mississippi Valley has failed to progress normally in population and industry because of high transportation costs, the effect of the development and use of inland waterway transportation on the economic development of the Mississippi Valley, the influence of differential barge-rail rates lower than all-rail rates on the use of barge-rail service, the inferiority of barge-rail service to all-rail service in point of time and hazard which bears upon the value of service to shippers, the benefits of barge transportation to shippers in the Mississippi Valley who compete with shippers located on or near sea coasts (which latter shippers have available coastwise and intercoastal steamship service), and the savings in transportation expense to shippers from the use of barge transportation (R. 36-39);

The pioneering function with which the Congress has charged Federal[6a] (R. 42);

The railroads' insistence in the past on an inflexible application of the Ex Parte No. 96 formula, and the

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merchandise traffic in less-than-bargeload quantities. It is true that due to rising costs of labor, material and supplies since the decisions of the Commission in July, 1948, the Mississippi Valley Barge Line Company found it impossible to operate except at a substantial loss and that in order to abate such losses it declared said embargo in October, 1948. If and when the Mississippi Valley Barge Line Company is called upon under the contested order to reestablish service on basis of the prescribed differentials it may find it necessary to petition the Commission for modification of the differential plan or for a temporary stay of the effectiveness of its order. In the present posture of the proceeding it is important only to remember that neither of those circumstances has the slightest bearing upon the questions of law which the reviewing court must decide.

[6a] See Inland Waterways Corporation Act, pp. 45-48, *post*.

unsatisfactory port relations, other inconsistencies, and incongruous results produced thereby (R. 45); and

The comprehensive proposals for revisions of the existing joint differential rate structures submitted by Federal, Valley, and the Mississippi Valley Association, and the basis for each (R. 45-46).

The Commission noted that the barge-line proposals were based upon a "relative level of rates necessary to cover full cost, including a return on investment, for the barge portion of the through haul, and to provide for the rail portion of the through haul revenues as great as if the traffic were transported all-rail" (R. 46).

The findings of the Commission.

General findings as to the prescribed routes and differentials being justified as reasonable.

With respect to the differential routes and rates prescribed by it, the Commission entered three numbered formal findings. (R. 51-52) In No. 1, which deals with class rates, it found that the differentials individually named in the appendices to the report were "justified as reasonable differentials." In Finding No. 2, which deals with commodity rates, the Commission specified the method for determining such differentials and found that the resulting differentials "would be justified." In Finding No. 3, which deals with through routes, the Commission found that those prescribed in connection with the differentials found justified and reasonable in Findings Nos. 1 and 2 are "necessary and desirable in the public interest."

Earlier in the report, after describing the rate proposals before it, the Commission stated that the appendices to the report showed the differentials "which we consider justified." (R. 48) Immediately following that the Commission indicated the basis which it approved for the grouping of interior points to be included at a common differential with a specified key-point, and noted certain restrictions on the grouping proposed by Federal which it provided "to prevent excessive circuity." (R. 48)

Special findings as to particular portions of the adjustment.

The Commission specially discussed the commodity rate adjustment, indicated the method to be used in determining differentials in connection with commodity rates, and said, "There appears to be no better way of dealing generally with commodity rates." (R. 49)

A special discussion was also devoted to differential rates on sugar as to which the Commission found:

> A large amount of evidence concerning sugar rates was presented in this proceeding, but before the hearings were concluded a voluntary adjustment was reached providing for a scheme of differentials differing from the general basis. The barge-and-rail rates on sugar have a vital relation to the general competitive rate relationships on sugar from all producing points to midwestern consuming points, and we consider it highly desirable that no change in sugar rates be made as a result of our findings here. (R. 49)

Pursuant to that finding existing differential rates on sugar were excepted from the Finding No. 2. (R. 52)

The Commission also gave special consideration to rates on bulk commodities, as to which it found:

> Bulk commodities are largely handled in an all-water service or on combination rates not under a common arrangement for through carriage, for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore interior points generally do not have facilities for handling such large consignments. For that reason we shall not prescribe through routes and joint rates on bulk commodities. (R. 50)

Consistent with the foregoing, commodity rates on commodities in bulk were excepted from Finding No. 2. (R. 52)

Special consideration and findings were also provided with respect to the adjustment of differential barge-rail rates from New Orleans to the interior as compared with all-rail rates from Galveston and Houston. The Commission found that existing situations which provided lower barge-rail differential rates from New Orleans to Oklahoma City via Memphis than the corresponding all-rail rates from Houston to Oklahoma City could not be defended. (R. 50) Consistent with that view the Commission imposed special limitations on barge-rail rates between New Orleans and interior points when the rail portion of the barge-rail route is longer than the rail distance between Houston-Galveston and the same interior point. (R. 52, 76-77)

Findings as to relative costs of service.

Additional findings of the Commission to be considered relate to costs of service via rail as compared with via barge. The rate and differential proposals offered by the barge-line appellees proceeded on the assumption that the existing rail rate structure reflected a proper allocation of rail costs, including return on rate making value, to the particular point-to-point hauls of particular commodities to which such rail rates apply. Consequently, they introduced no evidence dealing with all-rail costs although they did make a complete showing as to their own costs in transporting the particular commodities which made up the barge-rail traffic. The railroads offered as evidence only figures derived from general averages experienced in the handling of all commodities between all points on the railroads embraced in the studies.[7]

The barge lines offered substantial evidence in criticism of the various studies of rail costs and of the comparisons with barge costs based thereon.[8] These criticisms went to the underlying data, to the methods used in arriving at unit costs, and to the theory of the railroads that costs based on a general average for all traffic were representative of costs on the particular composition of traffic which moves in barge-rail service.

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[7] Exhibit Nos. 923, 1049, 1149, 1351, 1352 and 1353 in the Commission's record, and the testimony given in explanation thereof, illustrate this evidence.

[8] This is illustrated in the testimony of Witness Fletcher found at pages 15206-15307, 15547-15644 of the transcript and exhibits Nos. 1376 to 1409 introduced in connection therewith as shown in the Commission's record.

The Commission made no findings to settle the controversy as to these matters. Rather, it said:

> . . . No useful purpose would be served by reviewing these criticisms with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail. (R. 33)

The Commission record provides no showing of general average unit costs for rail transportation in the period after 1933-38. The Commission record does contain some financial data for the period extending up to 1947 for barge lines by reason of the stipulation of annual reports into the record heretofore mentioned. For Federal such annual reports showed as of 1947 that prospects for profitable operation were dependent on a program of rehabilitation and modernization of methods and equipment.[9]

Following its refusal to make any finding one way or the other as to the relation of all-rail to barge-line costs and the note it took of annual report data for Federal in 1947, the Commission said:

> In the face of these facts we cannot find that at the present time there are demonstratable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials. (R. 36)

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[9] These recitals as to conditions in 1947 referred to the entire operations and traffic handled, the preponderance of which was not involved in the joint rate structure under review. See tonnage data in footnote 5 on page 7 above. Furthermore, there was no separation of operations conducted by Federal to carry out the pioneering function with which it has been charged by the Congress from other operations.

The lower court correctly construed the foregoing as the Commission's statement of its inability to make an affirmative finding, and not as an affirmative finding that the cost of service via all-rail is less than via barge. (R. 183)

The findings as to Congressional policy.

The railroads contended in the Commission proceedings that as a matter of law, no differential may be found justified unless there is an affirmative showing of lower costs of service via the barge-rail route than via the all-rail route between the same points. This requirement is alleged to be found in the National Transportation Policy (59 Stat. 899) and section 307(d) of the Interstate Commerce Act (54 Stat. 937). In a section of its report dealing with congressional policy this contention was carefully appraised in the light of all pertinent legislation which might throw light on the congressional intent. The conclusions of the Commission on this point were stated as follows:

> In view of these expressions of congressional policy with respect to barge transportation on the Mississippi River system, the interpretation of section 307(d) urged upon us by the railroads and their supporters that the justification for differentials must rest upon proof of lower cost of barge-rail service seems much too narrow. (R. 41)
>
> * * *
>
> Neither the wording nor the legislative history of that section supports the conclusion that differentials are justified only where there is such an affirmative showing. (R. 41)

In this same section of its report the Commission took note of the railroad contention "that the differential rates are economically unsound because they

tend to divert traffic from all-rail routes over which it can be handled more advantageously and thus increase the economic burden on the transportation system as a whole."

As to this the Commission found:

> We are unable to accept this argument based on the national transportation policy. In the past several years Federal has received continuing consideration by congressional committees on appropriations as well as others. It definitely appears from that consideration that Federal is [fol. 49] deemed to be performing a pioneering function for the purpose among others of demonstrating the advantages of joint barge-and-rail transportation in the belief that such service eventually will prove to be economical.[21] It is not for us to say that the experiment should now come to an end. (R. 42-43)

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[21] In a report to the House Appropriations Committee by the House Small Business Committee, dated May 14, 1947, relating to the Inland Waterways Corporation, the latter committee said:

"It is apparent that the privately owned barge lines will not initiate service on the Missouri River. These operators are generally of the opinion that operations on the Missouri are unfeasible, in view of the speed of the current, and the depth and instability of the channel.

"With the proposed new towing equipment, Federal Barge Lines hopes to show privately owned barge lines that operations on the Missouri need not be unprofitable.

"Barge service is of great importance to the communities on the Missouri River. Rail transportation is costly from these interior points and it is difficult for them to compete with communities which are closer to their markets. The Panama Canal increased their competition by cutting transportation costs from the Pacific coast. Thus, their markets were further restricted. The railroads then, to compete with the Canal, initiated water-compelled rates from the west coast to Chicago so that it costs less to ship some commodities to and from Chicago from and to the west coast than it does in the case of certain mid-west communities.

"By lowering transportation costs, barge service will give this area access to new markets and sources of supply."

When read in its context this particular section of the report had as its primary purpose the recital of the reasons which led the Commission to conclude that the railroads were wrong in contending that findings based on affirmative proof as to relative costs of service is essential, as a matter of law, to the fixation of lawful differentials.

The Commission concluded this section of its report by finding:

> Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified. (R. 44)

The foregoing summarizes the findings which express the ultimate conclusion of the Commission as to the prescribed barge-rail routes and differentials. Those findings show that such conclusions were predicated on the evidence before the Commission, that in particular cases the Commission imposed special requirements to avoid wasteful service and to avoid discriminations against localities not served by barge-rail routes, and that the Commission applied the law in the belief that findings based on an affirmative showing of lower costs via the differential route was not a *sine qua non* to a valid order.

Other findings which relate to matters considered by the Commission in reaching its ultimate conclusion.

The Commission rejected any rigid formula as inappropriate to the determination of justified and reasonable differentials. (R. 46) The individual differentials shown in the appendices to the report occupy twenty closely spaced pages of record, as many as five different columns for differentials being shown on many pages. (R. 55-74) The Commission did not treat the determination of differentials as a mathematical problem to which an equation can be applied, nor did it spell out the weight which it gave to each item of evidence, nor did it disclose the mental operations by which its decision was reached as to any particular differential.

Weight was obviously given to experience under the existing differential adjustment. As to that the Commission said:

> Controversy over the subject of joint barge-and-rail rates has perhaps tended to obscure the facts that from the standpoint of practicality the present structure of joint rates by and large is a fairly satisfactory product of an evolutionary process. (R. 44)

Specific mention was made of "unsatisfactory port relations and other inconsistencies" and of "incongruous results" produced by the Ex Parte No. 96 formula which is the basis for a part of the existing structure. (R. 45) That led the Commission to conclude:

> Under present conditions it is not necessary or desirable to adhere rigidly to the Ex Parte 96

> formula, which was originally devised when only Federal was in operation. (R. 45)
>
> * * *
>
> Since distance scales of joint barge-line rates having many of the aspects of a formula are not feasible, the only alternative is the prescription of individual rates. Because of the extensive territory involved, these must necessarily be confined to groups or key points. (R. 46)

The value of the service to shippers (R. 38), the benefit to shippers of barge-rail rates lower than all-rail rates (R. 39), and the increased opportunity of Mississippi Valley shippers to compete with those on or near the sea coasts where coastwise and intercoastal service is available (R. 49) were treated as circumstances bearing upon the ultimate conclusions.

The report makes it clear that weight was accorded the comprehensive proposals of Federal and Valley. (R. 45-48) If the record before the Commission had been printed so as to make convenient an appraisal of those proposals, the Court could better appreciate the complete coverage which they provided of all rate making circumstances and factors which might be of interest to the administrative body. Both proposals were predicated on a complete and comprehensive analysis of the joint traffic as distinguished from the port-to-port traffic and of the barge-line costs incurred in the transportation of the joint traffic. Additionally, extensive analyses were made as to the divisions which the rail lines received out of the corresponding all-rail rates on a like consist of traffic. The Commission's

report makes it plain (R. 46) that the differentials found justified as reasonable were designed:

> 1. To give connecting rail lines substantially the same revenue out of barge-rail rates as they would receive if the traffic were handled in connection with paralleling rail lines on the higher rail rates, and
>
> 2. To leave a remainder to the barge lines which would cover their actual costs, including the transfer of the traffic between barges and cars, for the water leg of the through journey, plus a fair profit.

The barge-line proposals suggested particular differentials for interior points according to specified groups. The differentials proposed bore varying relations to the all-rail rates. For interior points involving unreasonable circuity and for routes in which the barge hauls were a relatively small portion of the total hauls, no differential rates were proposed. Generally speaking the Commission adopted the grouping and the limitations on differentials shown in the Federal proposal, although it noted it imposed additional limitations of its own to prevent "excessive circuity." (R. 48)

Judgment of the lower court.

On January 12, 1950, the court below unanimously upheld the validity of the order as supported by sufficient findings, with those findings supported by substantial evidence, and as involving no misinterpretations of statutory provisions. (R. 189) The three-judge court did not content itself with simply making findings of fact and entering conclusions of law. Rather in

an opinion written by Lindley, J., it carefully examined the report of the Commission in the light of the appellants' contentions and found each and every one of those contentions to be without merit. (R. 173-184) That opinion provides an extremely helpful discussion of the points on which appellants rely and shows that none of them find support in either logic or law.

SUMMARY OF ARGUMENT

I. The appellants do not complain of the order as one to which they are subject. They complain only as competitors of those alleged to be favored by the order. That gives them no standing to maintain their suit. The loss of a competitive advantage is not the loss of a property right entitled to protection in an equity court.

II. The Commission's report shows on its face that its order was entered upon a consideration of all current and relevant evidence in the record before it. Among other things, that evidence dealt extensively with the history of barge line operations and rates; with the experience had under the existing structure of joint barge-rail rates, that being in part satisfactory and in part unsatisfactory; with shippers' interests and needs; with relative value of services to shippers; with the effect of rates and differentials on the flow of traffic; with the competitive situation as between carriers and as between shippers in various localities; and with the measure of differentials which would encourage the movement of traffic, permit barge lines to participate in barge-rail rates lower than all-rail rates, and at the same time pay to connecting rail lines substantially the same divisions that they would receive out of corresponding all-rail rates. The evidence so considered did not include that which dealt with the relative costs of service via barge as compared with

via rail because such evidence was found to be unrepresentative of conditions experienced on the date of the report. The Commission held that it had authority to prescribe differentials despite the absence of acceptable evidence as to relative costs of service and that congressional policy did not, as appellants contended, require the use of such costs as the controlling test in fixing a lawful relation of barge-rail to all-rail rates. There is nothing in the governing statutes to show that this view of the congressional policy is a mistaken one.

The Commission's finding on this point, which negatives the basic proposition on which appellants rely, is not, however, the *basis* for the order. So to view the report and order would credit the Commission with building the prescribed barge-rail adjustment on a void or a vacuum as its sole foundation, an engineering impossibility; and would require the Court to ignore all that is said in the comprehensive, although sharply condensed, report as to the evidence considered. Such a strained, unnatural construction of the report is not warranted by anything said or implied therein.

III. Cost of service by railroad could not, in any event, be determined from the evidence of record. All evidence as to rail costs was based on general averages for all commodities handled between all points and there was no proof that such general averages were representative of the particular hauls of the particular commodities involved. It is not so much that the proof as to this was lacking as it is that it was impossible

to produce such proof. The composition of the barge-rail traffic is limited, generally speaking, to merchandise goods shipped in packages, whereas the general averages for rail costs are based on services in which an entirely different group of commodities predominate, such as coal, grain, tank-car traffic, live stock and perishable commodities. Having only general averages for rail costs largely influenced by the heavy volume of the commodities just mentioned, it was impossible to make a comparison of like with like.

Over a period of years the Commission has, on repeated occasions, prescribed water-and-rail through rates lower than corresponding all-rail rates without, on any occasion, having any evidence as to relative costs of service. The statutory standards as to the lawfulness of the barge-rail rates here involved relate to public interest and reasonableness and are the same as were applied in such prior cases.

The rail rates themselves are not controlled by cost of service. They have been influenced by all the various circumstances which make up the transportation standard, including value of service, shipper needs, and carrier needs. In such a situation it would be impossible to determine barge-rail rates by differentials reflecting cost of service without producing an impracticable and unworkable rate structure.

Even if it were possible and practicable to determine cost of service relations and to treat such relations as a circumstance to be considered, the Commission's limit of judgment should not, as appellants urge, be restrained to the point where only such costs may be used

to measure lawful differentials. Heretofore this Court has held that neither proof of nor a finding as to relative costs of service is an indispensable condition precedent to the prescription of rate relations. This Court has also held that it is within the Commission's final say-so as to whether cost evidence should be accepted or rejected, and if accepted, as to the weight to be given to it. Orders of the Commission which fixed rates and rate relations without conformity to cost and cost relations, or even contrary to cost relations, have been sustained when not involving confiscation. There is no reason to apply any different rule in this case than has heretofore been applied by this Court in the line of cases just described.

The words "inherent advantages" in the National Transportation Policy have not and should not be construed as requiring affirmative proof of relative costs of service as the sole and controlling test of lawful differentials. Such a construction would give the Commission no opportunity to exercise its discretion to promote sound economic conditions in transportation and among the several carriers, to encourage the establishment of reasonable rates free from unfair or destructive competitive practices, or to develop, coordinate and preserve the national transportation system for the broad and general purposes stated in the Policy. When standards are general and to an extent overlapping, their application by the regulatory body should be free of judicial restraint except in clear cases of arbitrary or unconstitutional action.

IV. The report and order of the Commission contain the findings which are required by law when

through routes and joint differential rates are prescribed for water-rail application. Those findings show the application of statutory standards. The Commission is not required to do more. Appellants are mistaken when they urge that the Commission is required to specify the weight it gave to particular evidence and to set forth the details of the mental process by which it arrived at its conclusions.

V. The appellants in Nos. 46, 47 and 48, assuming they have a property right which the order affects, raise only one point not presented in No. 45, i.e., the alleged violation of the port preference clause in the Constitution. That clause does not control orders entered by the Commission within the limits of its statutory authority which do no more than provide different rates for different ports, even though in different states.

ARGUMENT

I. The standing of appellants to maintain their suit.

The railroad appellants in No. 45 do not show what, if any, property or property right of theirs is affected by the Commission's order. At page 52 of brief they say:

> * * * It is not the rail lines with which the barge lines connect, but those with which they are competitive, which are here complaining.[10]

If prior decisions of this Court are to be followed, the appellants have no standing to maintain their suit when they complain of the order only because it affects their competitive position.

Only those within the class on whom legislation alleged to be invalid operates directly have a right to equitable relief. *Darnell* v. *Indiana,* 226 U.S. 390; *Tennessee Electric Power Co.* v. *T. V. A.,* 306 U.S. 118, 137-140.

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[10] To illustrate: The Commission prescribed a through route and joint differential rate via barge lines from New Orleans to St. Louis and thence via various railroads including the Wabash, the Illinois Central, and the Gulf, Mobile & Ohio, to Chicago. The Gulf, Mobile & Ohio and the Illinois Central operate direct all-rail routes from New Orleans to Chicago. The Wabash does not operate south of St. Louis. The complaint is not by the Wabash, nor is it by the Illinois Central or Gulf, Mobile & Ohio, as a connection forced into a joint arrangement with barge lines against its desire to have *only* railroad connections. Rather the Wabash has no complaint in the illustrative case and the Illinois Central and the Gulf, Mobile & Ohio complain only as operators of all-rail routes from New Orleans which compete with the barge leg in the barge-rail route.

A rail line has no interest, legal or equitable, in competitive traffic, (*Atchison, T. & S. F. R. Co.* v. *U.S.*, 279 U.S. 768, 780) and without such an interest it has no standing to question the validity of the Commission's order. In *United States* v. *Illinois Central R. Co.*, 291 U.S. 457, appellees questioned the authority of the Commission to enter a barge-rail differential order without a hearing. This Court dealt with the merits of that case on the stated assumption that the questioned order, if enforced, would have affected property rights of appellees as *connecting* rail carriers. However, even as to carriers in that position, Mr. Justice Stone in concurring expressed the view that appellees who did not complain of confiscation had no property interest in prospective traffic which entitled them to resort to the equity powers of a federal court (pp. 465-466). In *Edward Hines Yellow Pines Trustees* v. *United States*, 263 U.S. 143, a shipper sought to enjoin an order of the Commission as invalid, his only interest being that of a competitor of the shippers favored by the order. At page 148 this Court said:

> But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges cancelled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do.

See also *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 295, 304; *Interstate Commerce Com.* v. *Chicago, R. I. & P. R. Co.*, 218 U.S. 88, 109; and *Sprunt & Son* v. *United States*, 281 U.S. 249, 256-257. In the case last cited this Court observed that merely to de-

prive plaintiffs of a competitive advantage by means of a Commission order alleged to be invalid neither subjected nor threatened plaintiffs with any legal wrong.

Since the appellants in No. 45 sue only as competitors of the appellee barge lines, this case is very like *Mississippi Valley Barge L. Co.* v. *United States,* 292 U.S. 282. There a barge line alleged that an order which authorized reductions in competitive rail rates was invalid as contrary to the declared policy of Congress. This Court held that contention to be without merit. In addition, it expressed doubt that the appellant had a standing sufficient to maintain the suit, citing the *Sprunt* case, and said at page 290:

> These objections to the suit coalesce to such an extent with the merits of the appellants' grievance under section 500 of the statute (Transportation Act, 1920) as to make it unnecessary to separate them.

We should note that none of the above cited cases which involved Commission orders arose under the National Transportation Policy added to the statute in 1940. Whether that added provision makes for a different situation as to the point immediately under consideration has not been ruled upon. Appellees did not seek a ruling on the point in the lower court because at that time the appellants in No. 45 had not made clear the capacity in which they complain.

The standing of the appellants in Nos. 46, 47 and 48, is no better than that of the appellees in No. 45. They are shippers who make no use of the prescribed routes and differential rates but compete with those who do.

They are not within the class on whom the order alleged to be invalid operates. Consequently, they have no independent right to maintain a suit challenging the validity of the Commission's order.

II. The Commission based its order upon the application of the substantive provisions of the Interstate Commerce Act to the facts, not upon a mistaken assumption as to Congressional policy.

The appellants contend that the Commission rested its order solely upon a mistaken view as to congressional policy and that it ignored the facts. The report shows on its face that the facts of record were not ignored. The Commission states categorically that its ultimate conclusions are based upon its view "of the facts before us" (*infra*, p. 17). Consideration of such facts impelled the careful working out by the Commission of all the details involved in the complex problem before it, as the report clearly discloses.

Appellants' argument on this point is based upon a misconception of that section of the report which deals with congressional policy. That section occupies five printed pages in the record (R. 39-44). The complete text of the report, excluding headnotes and appendices, which shows the many circumstances and factors taken into consideration occupy thirty-six printed pages (R. 18-54). When the five pages are read in the context they appear to be a preliminary discussion by the Commission of the principal point on which appellants relied throughout the proceedings before the Commission as well as in the lower court. It was their contention that a finding based on affirmative proof of

lower costs of barge-rail service than of all-rail service for the particular traffic involved was an indispensable condition precedent to the valid prescription of *any* differential.

The Commission might have disposed of that contention simply by finding that it is impossible, as a practical matter, to determine by the use of general average costs what is the actual cost of carrying a particular commodity between particular points when that commodity is but one out of thousands of different commodities carried by railroad between thousands of different points. Compare *Railway Express Agency* v. *United States*, 6 F. Supp. 249, 253 and cases cited. However, the Commission chose to take a different road. It simply held, as a matter of law, that neither the statute nor congressional policy imposed the requirement urged by the railroads (*infra*, p. 15).

To accept appellants' view on this point would require the Court to close its eyes to all except the five pages, to read those pages out of context and apart from the remainder, and to treat those five pages as constituting the report in its entirety. Additionally, a meaning would have to be given to the language of the Commission within those five pages which the words themselves do not warrant. This brings us to consider whether the Commission was correct in holding that a finding based on affirmative proof as to cost of service relations is not an indispensable condition precedent to the prescription of barge-rail differentials.

III. Proof of and a finding as to the cost relation of barge-rail to all-rail service is not an indispensable condition precedent to the entry of a valid order prescribing differentials.

Appellees do not question that relative costs of service are pertinent, though not indispensable, to the determination of reasonable and otherwise justified differentials. They did not on their part introduce evidence of all-rail costs because there is no method of determining point-to-point costs of rail service for the particular traffic under consideration.

The particular traffic handled in barge-rail joint service consists primarily of package or merchandise freight such as canned goods, sugar, iron and steel, etc. It is a simple matter to determine the barge costs directly associated with the port-to-port movements of those particular commodities, and that was done. It is impossible to determine railroad costs of service on that identical traffic between identical points because the only cost data for rail service available or shown in this record represents general averages covering the transportation of all commodities which move between all points in all-rail service. Such averages include among others the haulage of commodities such as coal, petroleum products in tank cars, bulk grain, live stock, ores, and perishable freight of all kinds, none of which are handled in barge-rail service, although in total they represent the preponderance of railroad traffic. In that circumstance any comparison of all-rail costs with barge-rail costs could not be a comparison of like with like. The fundamental infirmities involved in an attempt to use general average costs on all traffic to determine the particular costs associated with the

movement of particular commodities between particular points have repeatedly been recognized by the Commission and this Court.[11]

The appellants claim that it is beyond the Commission's authority, as a matter of law, to dispose of this case upon the usual criteria of rate making and that relative costs are an indispensable element whenever differential water-and-rail rates are involved. It is significant that in the many water-and-rail differential adjustments heretofore prescribed by the Commission it has reached conclusions and issued orders without having the benefit of any evidence and without making findings as to relative costs.[12]

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[11] *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 380-381; and *Northern P. R. Co.* v. *Department of Public Works*, 268 U.S. 39, 43. See also the discussion of "unsifted averages" in *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 568, 581-583.

West Coast Lumbermen's Assn. v. *Akron, C. & Y. Ry. Co.*, 183 I.C.C. 191, 198-199; *Proposed Lake Erie-Ohio River Canal*, 235 I.C.C. 753, 761; *Charges for Protective Service to Perishable Freight*, 241 I.C.C. 503, 510; *Bituminous Coal to Youngstown District*, 262 I.C.C. 683, 697; *Lighterage Cases*, 203 I.C.C. 481, 510; *Divisions of Joint Rates and Fares of M. & N. A. Ry. Co.*, 98 I.C.C. 119, 129; *Western Trunk-Line Class Rates*, 164 I.C.C. 1, 188; *Commonwealth of Ky.* v. *Ahnapee & W. Ry. Co.*, 213 I.C.C. 297, 308; *North Carolina Corp. Comm.* v. *Akron, C. & Y. Ry. Co.*, 213 I.C.C. 259, 274; *Pick-up and Delivery in Official Territory*, 218 I.C.C. 441, 477; *Ashland Coal & Ice Co., Inc.* v. *Atlantic Coast Line R. Co.*, 241 I.C.C. 120, 126, 129.

[12] As to ocean-and-rail rates between the north Atlantic and the southwest, see *Consolidated Southwestern Cases*, 123 I.C.C. 203, 364-378, 211 I.C.C. 601, 222 I.C.C. 229; as to lake-and-rail rates, see *Lake and Rail Class and Commodity Rates*, 205 I.C.C. 101, 214 I.C.C. 93; and as to ocean-and-rail rates in connection with Seatrain Lines, see *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 243 I.C.C. 199, 211. In the same category of cases is *Houston Cotton Exchange* v. *A. & A. R. R. Corp.*, 87 I.C.C. 392, 93 I.C.C. 268, in which differential rail-water-rail rates on cotton from points in Oklahoma to New England were determined "upon all the facts of record" (87 I.C.C. 398). The record in that case showed nothing as to relative costs of service and the order was sustained by this Court in *Chicago, R. I. & P. Co.* v. *United States*, 274 U.S. 29.

Even if it were practical to determine true cost of service relations on particular point-to-point moves, it would nevertheless be impractical to fix differentials solely on that basis. This is because rail rates to which such differentials are applied are not themselves related to or based on costs. Exhibit No. 1300 in the Commission's record, a reproduction of which appears just inside the back cover of this brief, shows point-to-point all-rail rates on traffic moving via barge-rail which range from 15 percent higher to 307 percent higher than all-rail costs when such costs are based on general averages for all traffic. These varying relations to general average costs reflect the influence of value of service and many other considerations, all embraced by the general term "transportation standard", to which lawful all-rail rates must conform. *United States* v. *Illinois C. R. Co.*, 263 U.S. 515, 524. The Commission in dealing with rail rates has said that for cost relations to control to the exclusion of all else could only result in "confusion and an impractical and unworkable rate structure". *Lighterage Cases*, 203 I.C.C. 481, 540. Any barge-rail rate structure to be workable must respond to the same type of influences as the rail rate structure on which based. There is no statutory warrant for putting barge-rail rates in the straight-jacket of costs of service any more than there is warrant for making costs or cost relations the sole test for lawful all-rail rates.

In *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U.S. 125, this Court had under review an order of the Commission prescribing rates on sand and gravel which included an arbitrary—a type of differential—

when the service involved a crossing of the Mississippi River. The order was assailed because the arbitrary had no support in evidence as to costs or differences in costs. In sustaining that order this Court said at page 132:

> Neither the failure of the Commission separately to ascertain and state, nor the absence of evidence to show, the cost to carriers of the ferry service requires annulment of the rates prescribed for transportation between the places on the east bank of the Mississippi and points west of the river.
>
> * * * While in the making of reasonable rates all the material facts are to be regarded, it has never been deemed necessary or practicable—if indeed it is at all possible—to ascertain in advance the cost to carriers of each of the various elements embraced in the transportation service. The Act does not require any such determination.

Regardless of what evidence as to costs of service is before the Commission it still is within its province to determine whether such evidence shall be accepted or rejected and, if accepted, the weight to be given thereto. See *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481; *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 359; and *New York* v. *United States*, 331 U.S. 284, 331. In the case last cited this Court sustained the order of the Commission in *Class Rate Investigation*, 1939, 262 I.C.C. 447, and one ground for attack upon the order was the failure of the prescribed rate relation to conform to the evidence before the Commission as to relative costs.

Failure to proportion prescribed rates or rate relations to relative costs does not constitute arbitrary action by the Commission. As stated, in *New York* v. *United States, supra,* this Court sustained an order of the Commission which would have been set aside if the rule were otherwise. In *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592, the appellants assailed an order of the Commission prescribing origin rate relations, such relations being expressed in rate differences, which are akin to differentials, in respect to rates on coal. Appellants contended that the rate differences required were not warranted by any difference in transportation conditions or in distance. That is like the contention that they were not warranted by differences in cost. This Court sustained that order against that line of attack.

In *Petroleum between Washington, Oregon, Idaho, Montana,* 234 I.C.C. 609, the Commission fixed minimum reasonable rates for rail and motor services but not in relation to the respective costs of service. In citing that case in *New Automobiles in Interstate Commerce,* 259 I.C.C 475, 536, the Commission observed that its finding therein "was based on the doctrine that minimum rates prescribed for different transportation agencies need not necessarily reflect the respective costs." The order in the *Petroleum* case was sustained by a three-judge district court in *Scandrett* v. *United States,* 32 F. Supp. 995, and was affirmed in this Court on motion in a *per curiam* opinion, 312 U.S. 661.

None of the cases above cited involved orders under section 307(d) of the Act. However, there is nothing

in that section or in its legislative history to suggest that reasonable barge-rail rates and differentials must be tested, as a matter of law, by standards different from those applied with the approval of this Court in the cases above cited. The words "reasonable" and "justified" do not connote a different standard when used in section 307(d) than when used in other sections of the Act.

Appellants place great reliance on *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567, in which this Court struck down an order of the Commission which sought to impose a higher rail rate on traffic received from a connecting barge line than the same railroads assessed on traffic received at the same point from a connecting rail line. Appellants say that that case rested on the principle that the lower cost of service via barge was an inherent advantage (Brief, appellants in No. 45, pp. 18-19, 35) and that the lower operating costs of the barge line in that case was the controlling factor in the decision of this Court (Brief, appellants in No. 45, p. 38). That could not possibly be so because in that case there was no showing whatsoever of rail costs. That case turned squarely on the proposition that as to the on-movement by railroads from the reshipping point there was no showing of a difference in conditions to justify a different rate on grain received from a barge line connection than on grain received from a rail line connection. The section of the Act construed in that case is 3(4), which forbids discrimination as between connecting lines.

Insofar as the test of "inherent advantages" is concerned that case stands only for the proposition that

such advantage is with the barge line when, its own cost considered, it is able to maintain a rate to shippers lower than the rate contemporaneously provided between the same points by rail. Parenthetically, as has been shown above, the differentials prescribed in this case fairly conform to that proposition and the lower court so viewed them. (R. 178)

The emphasis of appellants on the words "inherent advantages" in the National Transportation Policy, and their claim that those words mean only relative costs of service finds no support in the enactment or in its legislative history. As this Court said in *Interstate Commerce Com.* v. *Inland W. W. Corp.*, 319 U.S. 671, 691, the standards provided are "of considerable generality and some overlapping". The preservation of transportation by water as well as by rail is clearly indicated. Sound economic conditions are to be fostered. The establishment of reasonable charges without destructive competitive practices is to be encouraged. In dealing with the national transportation system the Commission is made the coordinator of different modes of transportation. *Eastern-Central M. C. Asso.* v. *United States*, 321 U.S. 194, 205-206. It would be impossible to carry out the National Transportation Policy if the Commission were to discard all considerations in the making of rates other than cost of service.

IV. The Commission's order discloses a rational basis for the conclusions reached and it is fully supported by all essential findings.

When the case is like the instant case there is no requirement in the statute that the Commission do more than "state [its] conclusions * * * together with its decision, order, or requirement in the premises" (sec. 14(1) of the Interstate Commerce Act; 41 Stat. 484). Appellants' argument on this point proceeds without taking note of that governing statutory provision.

If this Court agrees with the lower court that affirmative proof of lower costs of service via barge than via rail is not an indispensable predicate for a valid order there can be no question but in the mass of the facts before the Commission there is support for the precise differentials prescribed. That being so the Commission's findings on the facts are conclusive. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 512, 513.

This is not the kind of a case in which the statute makes a particular preliminary finding a necessary condition to the exercise by the Commission of its statutory power (compare *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454, 463, 464) or in which preliminary findings are necessary to show that the Commission observed or adhered to a specified standard (compare *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475).

This is an ordinary rate case. The Commission gave its judgment on the issues before it in the light of

all facts of record. The Commission was not bound to specify the weight given to any item of evidence, or to disclose the mental operations by which its decision was reached. *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349; *United States* v. *Pan American P. Corp.,* 304 U.S. 156; *Pennsylvania R. Co.* v. *United States,* 323 U.S. 588; *New York* v. *United States,* 331 U.S. 284. It is sufficient to sustain the validity of the order when the report shows, as does the report in the instant case, that the Commission viewed the evidence before it as all that was needful to the discharge of its duty in the premises and that such evidence was fairly considered in reaching its ultimate conclusions. *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 512, 513. Even though the Commission did not expand its report by illustrating the detail of all of the evidence which led it to conclude as it did, this Court may not doubt that all such evidence was fairly considered.

Appellants contend that it was not sufficient for the Commission to find that the prescribed through routes and joint rates were necessary and desirable in the public interest and that the prescribed differentials were justified as reasonable. They say that the Commission must find in addition that the rates resulting from the application of the differentials are "reasonable rates" and that the absence of such a finding leaves the order without necessary support. However, section 307(d), which provides the authority exercised, requires only that the through routes and joint rates be deemed by the Commission "to be necessary or desirable to the public interest" and that the differentials shall be "such reasonable differentials as it

may find to be justified". The findings of the Commission clearly conform to the statute. Furthermore, a finding that a differential is "reasonable" and that it should be deducted from a particular all-rail rate to arrive at the prescribed barge-rail rate is the equivalent of finding that the resultant barge-rail rate is reasonable.

V. Appellants in Nos. 46, 47 and 48, show no independent grounds for the invalidity of the Commission's order as to them.

The appellants in Nos. 46, 47 and 48, are shippers who make no use of the prescribed differential routes and rates. They consider themselves to be injured by such rates because they are or can be used by competitors. Passing the question of the standing of these appellants to sue, they suggest no ground for invalidity independent of those asserted by the appellants in No. 45, except as to the alleged violation of the port preference clause of the constitution. That point is settled against them by *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U.S. 125, 131.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Interstate Commerce Act, As Amended:

NATIONAL TRANSPORTATION POLICY.

[54 Stat. 899; preceding 49 U. S. C. sec. 1.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

Sec. 14. [24 Stat. 384, 25 Stat. 859, 34 Stat. 589, 41 Stat. 484; U. S. Code, title 49, sec. 14.] (1) That when-

ever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

* * * * *

Sec. 307(d) [54 Stat. 937; 49 U. S. C. sec. 907(d).] The Commission may and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. . . .

* * * * *

Sec. 320(e) [54 Stat. 950; 49 U. S. C. sec. 920(e).] Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended (U. S. C., title 49, sec. 153(e)), is hereby repealed as of October 1, 1940; *Provided, however,* That (1) any certificate

of public convenience and necessity granted to any carrier pursuant to the provisions of such subsection (e) shall continue in effect as though issued under the provisions of section 309 of the Interstate Commerce Act, as amended; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of such subsection (e) shall, after the repeal of such subsection (e), be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended.

* * * * *

Inland Waterways Corporation Act, as amended May 29, 1928, [45 Stat. 978-980, U. S. C., title 48, secs. 152-153] provides in part as follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to create the Inland Waterways Corporation for the purpose of carrying out the mandate and purpose of Congress, as expressed in sections 201 and 500 of the Transportation Act, and for other purposes," approved June 3, 1924 (paragraph 152, chapter 5, title 49, Code of Laws of the United States; chapter 243, volume 43, page 360, United States Statutes at Large), be, and the same is hereby, amended to read as follows:

"SEC. 2. The capital stock of the corporation shall be $15,000,000, all of which is hereby subscribed for by the United States. Such subscription shall be paid by the Secretary of the Treasury, within the appropriations therefor, upon call from time to time by the Secretary of War. Upon any such payment a receipt

therefor shall be issued by the corporation to the United States, and delivered to the Secretary of the Treasury, and shall be evidence of the stock ownership of the United States. There is hereby authorized to be appropriated the sum of $10,000,000, in addition to the $5,000,000 heretofore authorized, for the purpose of paying such subscription."

SEC. 2. That section 3 of said Act be, and the same is hereby, amended to read as follows:

"SEC. 3. (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War under section 201 of the Transportation Act, 1920, as amended, and shall continue to operate the facilities now being operated or that may hereafter be operated by it under the provisions of this Act; and shall, as soon as there is an improved channel sufficient to permit the same, initiate and continue the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

"(b) When the improvement of any tributary or connecting waterway of the Mississippi River, not including the Ohio River, shall have been completed or advanced to the point where within two years thereafter there will have been substantially completed a sufficient and dependable channel for the safe operation of suitable barges and towboats thereon; and when the Chief of Engineers of the United States Army shall certify that fact to the Secretary of War, the Secretary of War shall thereupon cause a survey of such tributary or connecting waterway to be made for the

purpose of ascertaining the amount of traffic, the terminal facilities, and the through routes and joint tariff arrangements with connecting carriers, that are or will, within such years, probably be available on such tributary or connecting waterway. As soon thereafter as such survey shall have been completed and a sufficient and dependable channel for the safe operation of suitable barges and towboats shall have been substantially completed, the Secretary of War may, if he finds from such survey that water transportation can, in the public interest, be successfully operated on such tributary or connecting waterway, extend the service of the Inland Waterways Corporation thereon as soon as the corporation shall have suitable facilities available therefor.

"(c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage in common-carrier service on such rivers.

"(d) When the Secretary of War shall find that

navigable channels and adequate terminals are substantially available as provided in paragraph (c) of this section, and when the Interstate Commerce Commission shall report to the Secretary of War that joint tariffs with rail carriers have been published and filed as provided in said paragraph, the Secretary of War is hereby authorized to lease for operation under private management, or to sell to private persons, companies, or corporations, the transportation facilities, or any unit thereof belonging to the corporation: *Provided,* That for the purpose of this paragraph the facilities of the corporation on the Mississippi River and its tributaries shall be considered one unit, and those on the Warrior River and its tributaries as one unit: *Provided further,* That the facilities of the corporation shall not be sold or leased (1) to any carrier by rail or to any person or company directly or indirectly connected with any carrier by rail; or (2) to any person, company, or corporation who shall not give satisfactory assurance and agree, as part of the consideration for such sale or lease, that the facilities so sold or leased will be continued in the common-carrier service in a manner substantially similar to the service rendered by the corporation, together with ample security by bond or otherwise to insure the faithful performance of such agreement; or (3) until the same has been appraised and the fair value thereof ascertained and reported to the President by the Interstate Commerce Commission, and the sale or lease thereof has been approved by the President."

(e) Repealed.

* * * * *

The Denison Act, (Sec. 3(e) of the Inland Waterways Corporation Act), repealed October 1, 1940:

Sec. 3(e) [45 Stat. 980.] [Repealed, effective October 1, 1940, by sec. 320(e) of the Interstate Commerce Act.] Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and

twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible. . . .

Statement Comparing All-Rail Costs on Movements
Exhibit 1092 with All-Rail Rates for

(1)	(2)	(3)
Item No.	Commodity	Movement From
505	Machinery	Kansas City....Mo
506	Canned Goods	Dundas....Wis
507	Rice	Stuttgart....Ark
508	Roofing	Dover....Ohio
509	Oil Cake Meal	Jersey City....NJ
510	Sauerkraut	Jonesville....Mich
511	Paper	Kalamazoo....Mich
512	" (Newsprint)	Niagara Falls....NY
513	Petroleum	Petrolia....Pa
514	Oil (Lubricating)	St. Marys....WVa
515	Band Iron	Warren....Ohio
516	Pipe	Wheeling....WVa
517	Bags	Worcester....Mass
519	Sheet Steel	Kokomo....Ind
520	Sheet Iron	Middletown....Ohio
521	Soda	Painesville....Ohio
523	Whiskey	Frankfort....Ky
524	Paper Boxes	Marseilles....Ill
525	Wire and Nails	Kokomo....Ind
527	Laundry Machinery	Peoria....Ill
528	Soap	St. Louis....Mo
529	"	" "
530	"	" "
531	"	" "
532	"	" "
534	White Lead	" "
535	Sugar	Gramercy....La
536	"	"
537	"	"
539	Sisal	New Orleans....La
540	Sugar	" "
541	Coffee	" "
542	Twine	" "
543	Sugar	" "
544	"	"
546	Roofing	Cincinnati....Ohio
547	Wood Fibre	Williamsport....Pa
548	Matches	Wheeling....WVa
550	Wagons	Toledo....Ohio
552	Earthenware	Newell....WVa
553	Steel Rods	Oil City....Pa
554	Hand Pumps	Saginaw....Mich
555	Engines	Springfield....Ohio
556	Wrought Iron Pipe	Youngstown....Ohio
557	" " "	"
559	Canned Goods	Austin....Ind
560	Canned Vegetables	"
561	Bottles	Gas City....Ind
563	Canned Goods	Austin....Ind
564	" "	"
565	" "	"
567	" "	Waldron....Ind

Statement Comparing All-Rail Costs on Movements Depicted in Witness Vivian's Exhibit 1092 with All-Rail Rates for Same Movements

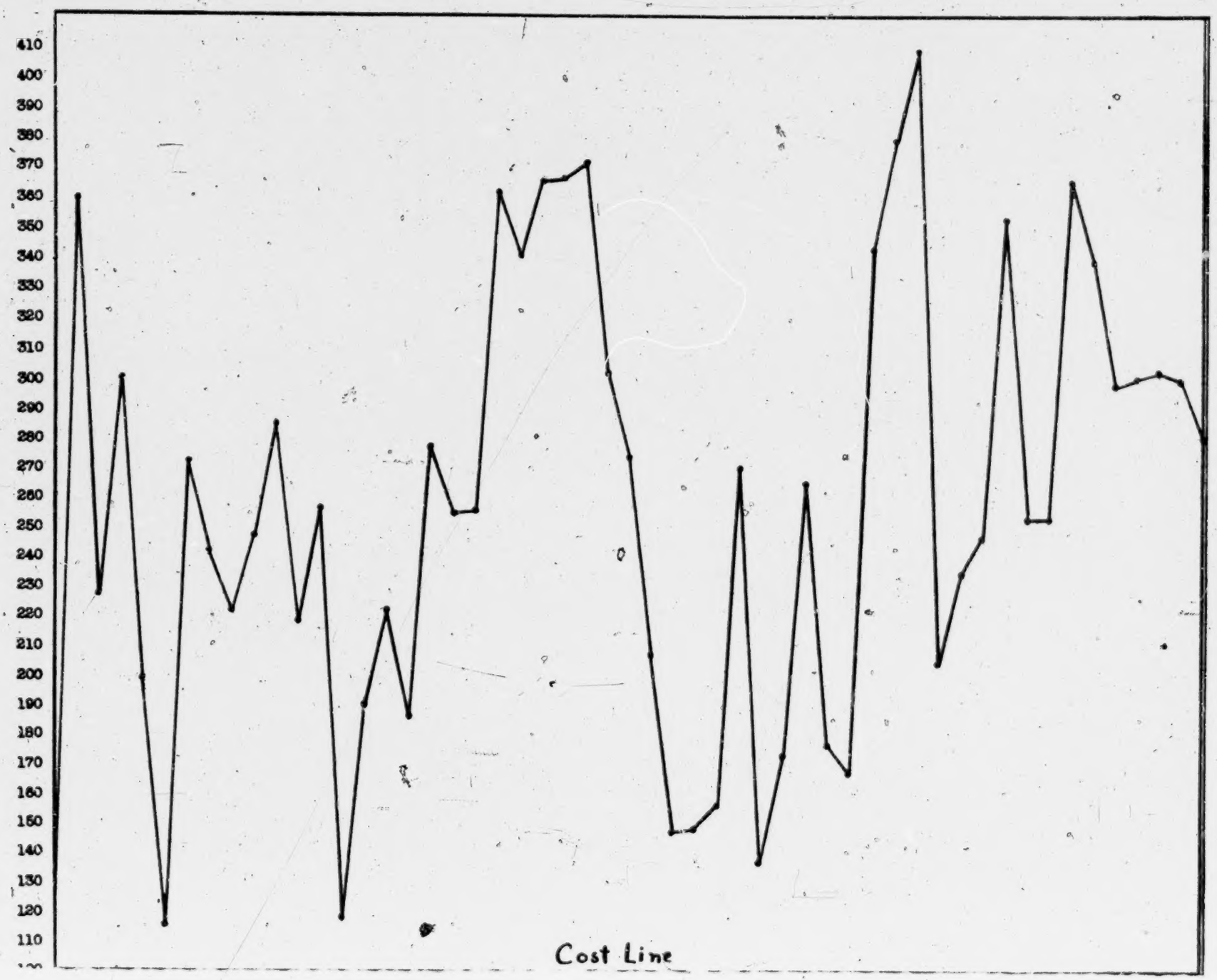
Exhibit A
MR. AMES

NO. 26712
EXHIBIT NO. 1300
WITNESS Pearson
(Page 1 of 2 pages)

(3)	(4)		(5)	(6)	(7)	(8)	(9)
	Movement			Vivian's All-Rail Costs			
	From	To	Tons	Total	Per Ton	All-Rail Rates Per Ton	Percentage Ratio of Rate to Cost (%)
	Kansas City....Mo	New Orleans....La	8	$ 56.86	$ 7.12	$25.60	359.6
	Dundas....Wis	" "	23	186.08	8.09	18.40	227.4
	Stuttgart....Ark	Louisville....Ky	20	62.70	3.14	9.40	299.4
	Dover....Ohio	Memphis....Tenn	28	135.57	4.84	9.60	198.3
	Jersey City....NJ	" "	20	152.65	7.63	8.80	115.3
	Jonesville....Mich	" "	25	118.04	4.72	12.80	271.2
	Kalamazoo....Mich	" "	19	86.92	4.57	11.00	240.7
	Niagara Falls....NY	" "	34	224.00	6.06	13.40	221.1
	Petrolia....Pa	" "	15	81.14	5.41	13.40	247.7
	St. Marys....WVa	" "	16	67.93	4.25	12.20	287.1
	Warren....Ohio	" "	24	121.29	5.05	11.00	217.8
	Wheeling....WVa	" "	34	151.66	4.46	11.40	255.6
	Worcester....Mass	" "	21	213.29	10.16	12.00	118.1
	Kokomo....Ind	New Orleans....La	18	109.99	6.11	11.60	189.9
	Middletown....Ohio	" "	22	121.02	5.50	12.20	221.8
	Painesville....Ohio	" "	49	357.61	7.30	13.60	186.3
	Frankfort....Ky	" "	15	76.23	5.08	14.00	275.6
	Marseilles....Ill	Memphis....Tenn	23	83.80	3.77	9.60	254.6
	Kokomo....Ind	" "	19	67.16	3.53	9.00	255.0
	Peoria....Ill	New Orleans....La	9	50.66	5.63	20.40	362.3
	St. Louis....Mo	Atkins....Ark	27	84.12	3.11	10.60	340.8
	" "	Brinkley....Ark	27	68.16	2.52	9.20	365.1
	" "	Little Rock....Ark	20	52.49	2.62	9.60	366.4
	" "	Marianna....Ark	20	49.69	2.48	9.20	371.0
	" "	Texarkana....Ark	33	127.50	3.86	11.60	300.5
	" "	Shreveport....La	24	103.98	4.33	11.80	272.5
	Gramercy....La	Austin....Ind	40	256.36	6.41	13.20	205.9
	" "	Mt. Pleasant....Mich	30	286.48	9.55	14.00	146.6
	" "	Vincennes....Ind	45	281.16	6.25	9.20	147.2
	New Orleans....La	Miamisburg....Ohio	21	114.53	5.45	8.60	157.8
	" "	Austin....Ind	40	195.99	4.90	13.20	269.4
	" "	Chicago....Ill	16	94.67	5.93	8.20	138.3
	" "	" "	15	91.24	6.08	10.40	171.1
	" "	Seymour....Ind	40	200.55	5.01	13.20	263.5
	" "	Terre Haute....Ind	50	262.41	5.25	9.20	175.2
	Cincinnati....Ohio	Dallas....Tex	30	203.74	6.79	11.40	167.9
	Williamsport....Pa	Tulsa....Okla	26	238.61	9.18	31.40	342.0
	Wheeling....WVa	Seavey....Ark	12	71.65	5.97	22.60	378.6
	Toledo....Ohio	Little Rock....Ark	10	52.53	5.25	21.40	407.6
	Newell....WVa	Sweetwater....Tex	12	123.73	10.31	21.00	203.7
	Oil City....Pa	Henderson....Tex	40	357.83	8.94	20.80	232.7
	Saginaw....Mich	Monroe....La	14	130.39	9.31	22.80	244.9
	Springfield....Ohio	Arp....Tex	21	138.70	6.60	23.20	351.5
	Youngstown....Ohio	Gladwater....Tex	40	311.90	7.80	19.60	251.3
	"	Kilgore....Tex	40	312.13	7.80	19.60	251.3
	Austin....Ind	Pine Bluff....Ark	20	69.23	3.46	12.60	364.2
	"	Little Rock....Ark	20	71.14	3.56	12.00	337.1
	Gas City....Ind	" "	15	72.06	4.80	14.20	296.8
	Austin....Ind	Shreveport....La	22	105.27	4.78	14.20	297.1
	"	Ferriday....La	20	94.64	4.73	14.20	300.2
	"	Shreveport....La	21	100.44	4.78	14.20	297.1
	Waldron....Ind	Alexandria....La	19	105.31	5.54	15.40	278.0

EXHIBIT No.
Page 2

GRAPH OF PERCENTAGE RATIOS--RATE PER TON TO VIVIAN COSTS PER TON--
SHOWN ON PAGE 1



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 45.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 46.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, *Appellants*,

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 47.

RAILROAD COMMISSION OF TEXAS, *Appellant*,

v.

THE UNITED STATES OF AMERICA, ET AL.

No. 48.

SAVANNAH SUGAR REFINING CORPORATION, *Appellant*,

v.

THE UNITED STATES OF AMERICA, ET AL.

On Appeals from the United States District Court for the Northern District of Illinois.

PETITION OF TEXAS INTERESTS, APPELLANTS IN NOS. 46 AND 47, FOR REHEARING.

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Railroad Commission of Texas.

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Attorney for
Galveston Chamber of Commerce
and
Houston Port and Traffic Bureau.

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Come now Galveston Chamber of Commerce, Houston Port and Traffic Bureau, and Railroad Commission of Texas, appellants in Nos. 46 and 47, to hereby petition this

Court to reconsider its decision of January 2, 1951, in the four cases named in the caption hereof.

With Mr. Justice Douglas dissenting, the Court affirmed a decision of a statutory three-judge Court which had denied an injunction against an order of the Interstate Commerce Commission prescribing joint barge-rail rates, differentially lower than all-rail rates, between points in the greater Mississippi Valley, typical of which are rates from New Orleans, La., applying by barge up the river from New Orleans to Memphis, Tenn., and thence inland by rail to Wichita, Kans., or Oklahoma City, Okla.

In this proceeding the above named Texas interests had joined the railroads in contending that the order of the Commission prescribing the barge-rail rates was unlawful because it was the result of arbitrary, irrational and capricious action by the Commission, and because it unconstitutionally preferred the State of Louisiana over the State of Texas in violation of the ports-preference clause of the Federal Constitution and resulted in undue preference of New Orleans and undue prejudice to Galveston and Houston interests in violation of Section 3(1) of the Interstate Commerce Act.

Ordinarily, in view of this Court's reputation for thoroughness, care and devotion to duty, we would hesitate to file a petition for reconsideration. However, this case is particularly difficult. The many facts, contentions and issues are so complicated and interrelated and some of them so elusive, that it is impossible for anyone who has not lived with the case for a long time to fully grasp and readily envision the whole situation without losing sight of the bearing which each fact, contention and issue has upon the others. We accordingly think the Court will appreciate this effort to again bring the whole picture into proper perspective.

The main question is whether, under the national transportation policy declared in the opening paragraph of the Interstate Commerce Act, the Commission, in making rates,

may arbitrarily disregard costs and other transportation conditions where competing types of carriers, competing ports and different States are involved. The question is of vital importance, not merely in this case but in others now pending and many which are yet to come. In the public interest as well as our own, we ask the Court to please give this case second thought before having a momentous decision therein permanently spread upon the pages of history for the future guidance of carriers and regulating tribunals.

Apparently for some reason of policy other appellants are not filing a petition for rehearing. However, that does not disturb us, as we feel we are here showing good grounds for a new decision.

I.

Near the top of page 6 of its decision the Court seems to make a point of the fact that the barge lines are willing to absorb the differentials out of their own revenue and that therefore the railroads should not complain. But note the effect upon the barge lines. It makes their revenue so low that the private barge lines which have to pay their bills with their own money embargo the traffic as unprofitable. Without the embargoes, these lines or the barge shipping public not using the barge-rail service would have to bear the burden of paying the losses. To correct this situation without increasing the rates, the divisions received out of the joint rates by the barge lines would have to be greatly increased, probably making the divisions received by the rail lines confiscatory. In other words, the railroads would be called upon to greatly sacrifice their revenues for the sole purpose of feeding traffic to the barge-rail lines, whose rates give New Orleans an edge over Galveston and Houston; and do so by violating the declared national transportation policy which calls for the preservation of the railroads' advantages over the barge-rail lines in costs and other items. All this adds up to the fact that the prescribed

barge-rail rates are unlawfully low because the Commission has refused to consider cost in fixing them. Therefore we say we are entitled to a decision from this Court that the Commission misunderstood Sec. 307(d) of the Interstate Commerce Act, as Mr. Justice Douglas indicates in his dissent, and that its order is accordingly void.

II.

In the last sentence of the paragraph ending at the middle of page 6 the Court says "the railroads complain of competition". We see no indications of record that they complain of competition itself. Their briefs and argument make it plain that what they complain of is the *unfairness* and *unjustness* of the competition which the Commission has forced upon them arbitrarily and unlawfully. The declared national transportation policy, which it is the duty of this Court to enforce, guarantees to each form of transportation full security from any act of the Commission which deprives it of its competitive advantages or grants to a competing form any unnatural favors.

III.

Near the top of page 7 the Court speaks of the "principal worth" of the inferior service of the barge-rail routes. We submit that inferiority has no relative or absolute worth or advantage. No one desires inferior service, except those few shippers who on occasions seek slow movement in order to use the carriers' transportation facilities as free traveling storage warehouses and those who seek delay in transit in order that they may take advantage of a rising market in the hope that their goods upon arrival will bring higher prices than if shipped by more expeditious means. As to such shippers, the so-called inferior service is in fact superior service. It is contrary to public interest for the Commission to put a premium on poor service and it should be condemned as unlawful here because

it is out of consonance with, and violative of, the declared national transportation policy.

IV.

In the paragraph beginning at the bottom of page 7 the Court says the Commission may permit a carrier to accept a rate yielding low return if satisfied that the rate is compensatory, etc. On the next page the Court concludes that the differentials were considered by the Commission to be compensatory, meaning apparently that rates made by use of the differentials were considered compensatory. The barge lines, particularly the privately-owned lines, are in business for profit. The latter, at least, have found the traffic to be unprofitable and the Commission has been so informed. If the Commission saw evidence in the record which proved that the barge lines were mistaken and that the traffic *was* compensatory it should have identified that evidence, for we have a right to test the legal basis of a Commission decision in the Courts and the Courts in turn must know why the Commission acts as it does. *Eastern-Central Assn.* v. *United States*, 321 U. S. 194, 211. *Republic Aviation Corp.* v. *National L. Rel. Bd.*, 324 U. S. 793, 803. Furthermore, the mere fact that a rate may be compensatory does not necessarily mean that it is reasonable. Compensatory means that it is not confiscatory. There may be a wide difference between a compensatory rate and a reasonable rate. The Commission can lawfully prescribe only a reasonable rate. (Interstate Commerce Act, Secs. 1(5)(a) and 15(1).)

V.

In the last sentence of the paragraph ending at the middle of page 8 the Court states in effect that if the barge lines deem the prescribed rates to be less than relevant costs, a rate hearing is the proper forum to rectify the difficulty. This was evidently prompted by what was said

in our brief (p. 24) about the embargoes laid by the two privately owned barge lines against barge-rail traffic because they found it unprofitable, and by the statement made upon oral argument by counsel for the barge lines to the effect that if the Commission's order were sanctioned by this Court and if the barge-rail lines had to take this traffic, the Mississippi Valley Barge Line would ask the Commission to amend the order. Just what amendment would be asked was not stated, but it is naturally understood that what was meant was an amendment which would eliminate that barge line from the operation of the order or increase the prescribed rates very substantially, probably up to the all-rail level, not only to avoid confiscation, but to put the rates on a reasonable level as required by Secs. 1(5)(a) and 15(1) of the Interstate Commerce Act. No such statement was made on behalf of the American Barge Line Company, but we could logically expect that it would take the same action. What about the Federal Barge Line? It has no embargo against this traffic, although it appears to be in no position to handle it at a profit. This line being subsidized would from all indications continue to handle the traffic and thus permit the preferred New Orleans port interests to ship at confiscatory rates to the great detriment and undue prejudice of the competing Galveston and Houston port interests. Where does that leave us? As indicated in the dissent, the Commission seeks to foster the program of Congress for the Federal Barge Line without having the justifying facts in the record which the law requires, and therefore it is not only conceivable, but probable, that the Commission would take no action against the rates of the Federal Barge Line. We here call attention to the statement in the dissent that the reason for the Commission's refusal to pursue the cost study into recent years is apparent. It is also conceivable that the Commission might not amend its order, even as to the two private barge lines, but arbitrarily say that the prescribed rates are reasonable, that the losses suffered by

the barge lines may flow from inadequate and unreasonably low divisions received by them out of the prescribed joint rates, and that therefore the remedy lies in the barge lines, filing of a formal complaint with the Commission to test the reasonableness of the divisions. In the circumstances described, Galveston and Houston would likely have to wait for years for relief that might never come. Cost studies, extended hearings, voluminous briefs, proposed reports, exceptions, replies to exceptions, oral argument and Court proceedings could keep the situation in a state of flux. Note in this connection that over 16 years have elapsed since the institution of the Commission's proceeding now before this Court and it is still unsettled.

What we are getting at right here is this: We have this case pending before this Court in which we have shown that New Orleans is unlawfully preferred to the detriment of the Texas interests, but in which the Commission has arbitrarily refused to grant corrective action. We submit that it is the duty of this Court to enjoin the Commission's order and direct the District Court to send the case back to the Commission instead of leaving it up to the barge lines to determine when, if ever, they will go to the Commission for an amended order and then perhaps get no relief.

We urge that where an administrative body violates the law, parties suffering legal wrong have a right to an injunction at once to avoid irreparable injury that would result form that body's order. Damage done by undue preference is generally irreparable. Where unduly preferential rates are charged there is as a practical matter, little if any hope of reparation for damages done thereby, for the requirements, *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, are so drastic that it is almost always impossible for a shipper to prove satisfactorily the amount of his claim. The situation is entirely different from one in which unreasonably high rates are charged, for there the shipper can generally obtain reparation by proving that he paid the freight charges.

We have entertained the fond hope that the Court would direct that an injunction issue against the Commission's order for the future rates; also that the case be remanded to the Commission for proper action, that action to be the immediate issuance of an order upon the present record permitting the cancellation of the existing barge-rail rates prescribed years ago, without a hearing. The existing rates are based on the traditional belief once held that barge-rail costs were less than all-rail costs. Although the Denison Act under which these rates were prescribed has been repealed, they are held in effect until the further order of the Commission by Sec. 320(e), Subsection (e) of Sec. 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended. (U.S.C. title 49, Sec. 153(e). Obviously, if there is no justification for the newly prescribed rates there is none for the existing rates.

Something that is difficult to understand is the way the Commission, after nonchalantly prescribing these rates, is now trying to defend them when it knows that the barge lines which are free to operate according to accepted, common sense, business standards, do not want the traffic, because they find it unprofitable. The law provides a remedy for such arbitrary action and puts that remedy in the hands of this Court. We respectfully pray for its immediate use.

VI.

In the paragraph ending near the middle of page 8 the Court says that it appears that the Commission substantially adopted the proposals of the barge lines. These proposals, which were self-serving declarations, were merely indications of what the barge lines wanted when they offered them. They have little, if any, probative value as against opposing parties. Moreover, they were made before the general level of rates necessary to produce reasonable revenue was increased something like 60 percent due to the increased costs which followed the war and which are still on the up-grade. The Commission was arbitrary in

using them as bases for future rates. The present embargoes are proof that the privately-owned barge lines would not propose these differentials today. In fact, if any barge-line operator wants them for the future he should be required to say why.

VII.

In the paragraph beginning at the middle of page 8 the Court speaks of the willingness of the barge lines to accept less for the inferior service than the all-rail lines charge for better service. The indications are that it is only the subsidized line which is willing to generally accept less, for the privately-owned lines have embargoed the traffic.

VIII.

In the same paragraph the Court says there is no provision in the statute making relative costs the sole and controlling consideration. The national transportation policy calls for the preservation of the advantages of each separate form of carriage. The all-rail routes must certainly have a natural advantage in cost for they are willing to handle traffic at their present rates, while the privately-owned barge lines find it unprofitable. As already pointed out the Commission's disregard of costs in this case has resulted in rates which the Mississippi Valley Barge Line stated upon oral argument it would resist. This illustrates the fallacy of disregarding cost where two competing forms of carriage are involved. We contended in our brief that it should not be assumed that deduction of the differentials from the depressed all-rail rates would result in reasonable and compensatory barge-rail rates.

IX.

Near the top of page 9 the Court says the railroads desire to eliminate competition through increases in the barge-rail rates. They are not trying to get rates increased which

should not be increased. All they are seeking to do is to get rid of competitive rates which the Commission has imposed upon them through what they say and we say was a misunderstanding or misapplication of the law. If correct understanding and application of the law causes increases, right will have prevailed.

X.

Below the middle of page 9 the Court says the Commission was bound to consider Congressional policy. That is true, but only so far as the record and the substantive provisions of the statute permit and justify. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and *United States* v. *New York Central R. Co.*, 263 U. S. 603. In other words, the Commission has no duty or power to carry out wishes of Congress independent of a formal record which furnishes a lawful basis. It can do nothing in furtherance of Congressional policy except in so far as it has authority under and in conformity with the substantive provisions of the Interstate Commerce Act respecting reasonable, nondiscriminatory and non-preferential rates. It can do no more because of the policy of Congress than it could otherwise.

There is every indication in the Commission's report that the real or dominant reason for prescribing the barge-rail rates was its belief that that was required by Congressional policy. The policy of Congress respecting barge-rail rates is reflected in Sec. 3 (c) of the Inland Waterways Corporation Act, enacted many years ago when it was believed that barge-rail transportation costs were lower than all-rail costs. It provides that the transportation services of the Federal Barge Line are to be continued until barge-rail rates are established *reasonably fair to both rail and water carriers*. This is anything but an absolute and unqualified requirement that barge-rail rates of the sort prescribed by the Commission in this case shall be prescribed and established. The meaning of "reasonably fair to both

rail and water carriers" is defined in the declaration of the national transportation policy. In other words, in carrying out the old policy in respect of water carriers the Commission can not lawfully violate the broad policy declared in 1940 covering the whole transportation problem. The Commission, instead of conforming to the declared policy, has required the barge-rail lines to engage in destructive competition with the railroads. Such competition is unlawful. *Eastern-Central Assn.* v. *United States*, 321 U. S. 194; p. 206.

XI.

At pages 10 and 11 the Court disposes of *I. C. C.* v. *Mechling*, 330 U. S. 567. We do not contend that the *Mechling* case involves the same factual situation as this case, but the Court there held, in effect, that the railroads, as connections of barge lines, could not manipulate their transportation charges for the purpose and effect of depriving the barge lines of traffic. In the present case we see the Commission using the barge lines' vicious differential absorption device as a means of driving traffic to the barge-rail lines as against the all-rail lines. The *Mechling* rule would be a poor rule if it did not work both ways.

XII.

Near the top of page 11 the Court says differentials for barge service do not constitute an unjust discrimination against the railroads, by express proviso of Sec. 305(c) of the Act. However, that Section applies only to all-water transportation. Sec. 3(1) does not contain that proviso and Sec. 3(1) is in Part One of the Act, which specifically applies to water-rail as well as all-rail transportation, as indicated in Sec. 1(a) thereof.

XIII.

In the paragraph beginning near the top of page 11 the Court says the inherent advantage of the railroads is su-

periority of service. That is just one element of advantage. Another is cost. When the Commission, as in this case, forces the railroads to join the barge lines in differential rates solely because of inferior service, the differentials offset the superior service and deprive the railroads of their advantage in violation of the transportation policy and all considerations of fair and lawful treatment.

XIV.

In the same paragraph reference is made to Pullman passenger service versus "milk-run" service. The main reason for charging more for the former is that speed and the movement of beautiful and heavy equipment cost the carriers a lot more than does the operation of a light train made up of cheap old coaches good for nothing else.

XV.

In the paragraph beginning at the middle of page 12 the Court states that the only point urged by the Texas appellants not already answered is that the Commission's order gives New Orleans a preference over other ports. We here call attention to the paragraph beginning at page 31 of our brief, where the contention is made that the barge-rail rates are unduly preferential of New Orleans and unduly prejudicial to Galveston and Houston in violation of Sec. 3(1) of the Interstate Commerce Act. Presently we shall also call attention to the chapter directly related thereto which begins on page 34 of our brief, which shows how the Commission made the barge-rail rates for New Orleans arbitrarily low and did not protect Galveston and Houston from the adverse effects of this legal error. The chapter covering undue preference and prejudice is supported in large part by this later chapter. The two may be considered together.

The barge-rail routes to many of the most important points in the West are very circuitous. For example, the

route from New Orleans to Oklahoma City, Okla., is by barge northward up the river to Memphis and thence by rail westward. The river portion of the through distance is 748 miles and the rail portion 485 miles. It was shown at the hearing before the Commission that import commodity barge-rail rates from New Orleans to Oklahoma City were lower than those by rail from Houston to Oklahoma City, although the rail distance from Memphis to Oklahoma City is 20 miles greater than rail distances from Houston to Oklahoma City. (Distances are taken from pages 2 and 6, Exhibit 1033, I. C. C. Record.) The Commission, in dealing with the matter of rate relations and undue preference of New Orleans, said in its report that such situations as that just described could not be defended. (270 I. C. C. 591, at p. 617. R. 50.) In finding 2, which prescribes the general basis for barge-rail commodity rates (274 I. C. C. 229, at p. 230, R. 76), the Commission wrote a proviso that New Orleans was not to get a lower barge-rail commodity rate than Galveston or Houston where the rail portion of the barge-rail distance exceeded the distance from Galveston or Houston to destination. In other words, the Commission held that since the railroads have to perform even more service in connection with barge-rail via Memphis than they do via rail from the Texas ports, it would not require any lower barge-rail rates from New Orleans than might apply all-rail from the Texas ports. This proviso of course makes the barge-rail rates higher than they would be under the strict application of the general basis just mentioned. However, as the proviso recognizes only the rail portion of the through haul, it disregards the barge portion altogether. This is arbitrary action and nothing else. New Orleans and the affected interior points thereby get much lower barge-rail rates than they would if the barge portion of the haul were also taken into account. It will thus be seen that the Commission proceeds to test the rights of the Texas ports under Section 3(1) of the Interstate Commerce Act by comparison of the whole

of the transportation service from Galveston and Houston to the interior with only the rail portion of the barge-rail service from New Orleans. Had the Commission added a reasonable figure to represent the transportation by barge up to Memphis, the barge-rail rates would have been much higher than the rail rates from Houston. The arbitrary action of the Commission in the respect above described adversely affects not only the particular destination where the distances are greater from Memphis than from Houston, but many points east of that destination until the point is reached where a barge-rail equated distance from New Orleans to destination would become less than the rail distance from Houston. At a point about 10 miles east of Oklahoma City the distance from Memphis becomes less than that from Houston and under the Commission's decision gets a lower rate from New Orleans than applies from Houston. In a previous case, *Inland Waterways Corp., through Routes and Rates*, 192 I. C. C. 663, the Commission equated water distances to rail distances without cost data, but it arbitrarily failed to do so here where there was a mass of good evidence as to relative costs. It is the arbitrary disregard of the barge haul to Memphis which accords New Orleans such preferential rates instead of rates based on geography and transportation conditions, which rates would considerably exceed the rates from Houston either *per se* or equated distance considered. Thus New Orleans is given artificial advantages, while Galveston and Houston are deprived of their advantages of location. As the Court pointed out in the concluding paragraph of its decision in this case, the law does not attempt to equalize fortune, opportunities or abilities. Natural advantages are to be preserved.

Promptly after the Commission handed down its first decision we filed a petition for modification of Findings 1 and 2 in respect of the above matter, but to no avail, the Commission saying that it did not have the necessary evidence. If it did not have such evidence it should not have

prescribed the rates, for under the Interstate Commerce Act it may lawfully prescribe only such barge-rail rates as it may find to be justified on the facts of record. How in the world can anyone decide whether a rate is reasonable if he considers merely the mileage for a fragment of the haul instead of the transportation conditions involved in the through haul?

We undertook to deal fully with the proviso in the chapter above mentioned, entitled "Finding 2 is Arbitrary", beginning at page 34 of our brief. However, it presents a very technical and complicated question and we thought best to here spell out the whole situation in new language to make it easier for the Court to see the vital bearing the proviso has upon the issue of undue preference and prejudice. It involves a matter of law on which the Court should certainly pass in this case.

We submit that it is clear that the Commission has required the barge-rail lines to give New Orleans unduly preferential rates to the prejudice of Galveston and Houston in violation of Section 3(1) of the Interstate Commerce Act. It has required these rates to be made by deducting the differentials from New Orleans all-rail export and import rates, which to the most important points are depressed to the level of the Galveston-Houston all-rail rates regardless of the greater distances from New Orleans. Let us again take, as an example, Oklahoma City, served by the "Rock Island." This road has a line from Galveston and Houston to Oklahoma City and one from Memphis to Oklahoma City. It has its own all-rail rates from Galveston and Houston to Oklahoma City, and at the same time is an effective participant in the prescribed barge-rail rates from New Orleans within the meaning of *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, p. 650, coupled with *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136. This fact furnishes the legal basis for a finding of undue preference which the Commission failed to make. Not only did it thus fail, but it actually ordered the sort of undue

preference and prejudice which Section 3(1) of the Interstate Commerce Act under the decisions just cited condemns.

Ports are specifically named in Section 3(1) of the Interstate Commerce Act along with localities, persons, firms, corporation, etc., entitled to its protection. They were not originally included by specific mention, but were brought in by an amendment in 1935. This amendment was enacted quickly after this Court in a 5 to 4 decision, with vigorous dissents, had held in *Texas & Pac. Ry. Co.* v. *United States*, *supra*, at p. 638, that Section 3(1) was not intended to cover ports as respects traffic passing through them. The cited case was one in which Galveston was seeking the removal of preferences accorded New Orlaens by all-rail rates to and from the interior Southwest.

The proceeding in which the Commission prescribed the barge-rail rates was a general investigation of the kind authorized in Section 13(2) of the Interstate Commerce Act. As stated in the third paragraph of the Commission's first report it was an investigation into the reasonableness and *lawfulness otherwise* of the barge-rail rates. To be lawful a rate must be non-preferential and non-prejudicial as well as reasonable. At one of the hearings the Texas port interests offered evidence showing the rate advantages enjoyed by New Orleans and proved the detrimental commercial and economic effect thereof upon Galveston and Houston. (See pages 9 and 10 of our last brief.) In view of the above facts, if the barge-rail rates were otherwise justified, the Commission should have made a finding of undue preference of New Orleans and undue prejudice to Galveston and Houston and conditioned the establishment of the barge-rail rates upon a contemporaneous establishment of all-rail rates for Galveston and Houston properly related to the prescribed barge-rail rates for New Orleans. It was arbitrary and irrational in not doing so.

XVI.

At the bottom of page 12, in dealing with the ports-preference matter under the Federal Constitution, the Court quotes from *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131, where it was held that the limitations specified in the Constitution on the power of Congress were set to prevent preference as between States in respect of their ports or in respect of the entry and clearance of vessels. What we are complaining about here is preference of the State of Louisiana over the State of Texas. The Railroad Commission of Texas, an instrument of the sovereign State, is the appellant in No. 47. For the welfare of its citizenry, whose interests are affected by the prosperity and development of the Texas ports, the State insists that it is entitled to non-prejudicial treatment at the hands of the Commission in the matter of rate relations.

The quotation just referred to says in the last sentence that Congress causes many things to be done that benefit particular ports to the disadvantage of other ports in neighboring States. However, the present proceeding does not involve anything that Congress has directly caused to be done. It involves only what the Commission has done, and the Commission has no power to do anything in respect of barge-rail rates except what the proven facts on a formal record justify.

We further submit that rate preferences for ports and for states having ports are in the same category as rules and regulations regarding the entry and clearance of vessels. See the appendix to this petition, which covers debates in the Constitutional Convention in the light of which the Constitution was written and adopted. Particular attention is called to the last paragraph of the propositions submitted by Mr. McHenry and Gen. Pickney, which called for uniformity at all ports in the matters of duties, imposts and excise, prohibitions or restraints, laid or made

by Congress. Section 8 of the Constitution requires that all duties, imposts and excises shall be uniform throughout the United States. We urge that the paragraph from the *Louisiana Public Service* case, *supra*, quoted at the bottom of page 12 of the Court's decision herein, does not rule out such things as duties, imposts and prohibitions of preference in rates. Moreover, that case was in no way similar to the present case. This is readily apparent upon examination.

It was well settled long ago that the Constitution was not to be construed strictly, like a criminal law, but in the very broadest way. What the Constitution provides is principles, guarantys, prohibitions, etc., stated in general terms for the benefit of present and unborn generations and for application to present and future inventions and developments. Witness for example what the Court has extended the term "interstate commerce" to mean in modern times. When the Constitution was adopted there were no railroads and no freight rates to prefer or prejudice particular States or ports. But there were the matters of regulations affecting the entry and clearance of vessels and the imposition of duties. The principles which were then outlined for application thereto are symbols, samples and precedents for use now as guides in dealing with things that affect the public in substantially the same way as discriminations respecting the other things just mentioned. Consequently, we were surprised by the holding of the Court in this case that the ports-preference clause of the Constitution should be confined narrowly to such things as the entry and clearance of vessels, which are not even mentioned in the clause. The clause referred to mentions "Regulations of Commerce or Revenue" without qualifications. The prohibition of preference respecting commerce and revenue is in a separate sentence from that respecting the entry and clearance of vessels and the payment of duties by vessels. Let us here turn to *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, where this Court, after discussion of the

clause in question and mentioning legislation respecting the entry and clearance of vessels, held that the clause "may, certainly, embrace any other description of legislation looking to a direct privilege or preference of the ports of one State over those of another." We ask the Court to please re-read carefully pages 433 to 435 of that decision and the chapter that begins at page 32 of our brief. The amendment to the Interstate Commerce Act dealt with above in XV in connection with the matter of undue preference and prejudice under Section 3(1) of that Act shows that Congress is deeply concerned about matters of port preference, just as was the Constitutional Convention. Congress itself may have a right to disregard costs in rate making but if it does it may not arbitrarily treat one section of the country or particular points better than others. Suppose Congress should enact a simple-worded law to the effect that the ports of the State of Louisiana should be favored with rates 25 percent less than those for ports of the State of Texas for equal distances regardless of transportation operating costs. Could any reasonable-minded person believe that this Court would hesitate to declare the legislation unconstitutional? And yet it has, in principle and practical effect done just that in this case.

We submit that the only preferences, which under the Constitution Congress may arbitrarily give particular ports or particular States having the ports, are in respect of physical matters, governed primarily by geography, population, areas of production and consumption, etc., and including such things as the establishing of ports, erection and operation of lighthouses, improvement of rivers and harbors and the providing of structures for the convenient and economical handling of traffic. See *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, p. 435; and *Armour Packing Co.* v. *United States*, 209 U. S. 58, p. 80.

XVII.

In the concluding sentence of its decision the Court holds that if there is preference to New Orleans it is geographical and not due to the Commission's action. We ask the Court to take a second thought and decide again whether New Orleans has any natural advantage by being located at a point served by barge lines which cannot handle this traffic except at a loss and which, when they do handle it, give slow service and smash up so many packages in interchanging the traffic with the railroads at the river-landing transfer points. It is Galveston and Houston which have the natural advantage, for the railroads serving them can perform the service of transportation cheaper mile-for-mile than the barge-rail routes serving New Orleans. The only advantages New Orleans has is the result of the Commission's requirement that the barge lines join the railroads in rates made confiscatory by application of the value-of-service element. When the Commission decided its case it had reasonable indications of the fact that the barge lines considered the traffic unprofitable (see 270 I.C.C. 591, p. 606. R. 35) and it was therefore arbitrary for the Commission to order the rates into effect. Poor service is no justification under such circumstances. The Interstate Commerce Act, through the minimum-rate power, prohibits rates that are not compensatory or not up to a reasonable level and it was the duty of the Commission to find that the existing rates were less than reasonable minima and condemn them; also that rates such as were prescribed for the future would likewise violate the law. By the prescription of rates for New Orleans which are less than reasonable minima the Government gives that port and the State of Louisiana advantages they are not naturally entitled to whether considered alone or as competitors of Galveston and Houston and the State of Texas.

We submit that we have proved a perfectly good case of undue preference of New Orleans and the State of Louisi-

ana and undue prejudice to Galveston and Houston and the State of Texas in violation of Section 3(1) of the Interstate Commerce Act and the Constitution.

XVIII.

The substance of the dissent of Mr. Justice Douglas is that only Congress may disregard cost. We say that if Congress had ever intended to delegate such a fundamental power, assuming that it could have done that constitutionally, it would certainly have said so in unmistakable language. Further, it is difficult to believe that Congress would ever want to place in the hands of a subordinate body such a dangerous power. We see in this case the unfortunate results of ignoring cost. The Mississippi Valley Barge Line's announcement upon oral argument is very revealing in that respect. We submit that under the ports-preference clause of the Constitution, even Congress can not disregard cost where ports are concerned, for we feel sure that rates are within the prohibition. But assuming that Congress may disregard cost the Justice is eminently correct in saying that the Commission may not do so. The Commission is bound to govern itself by the declared national transportation policy and the formal record.

We pray the Court to reopen the case, reverse its decision, and direct the issuance of an injunction and remand of the case to the Commission for appropriate action. Should the Court decide not to enjoin the order in its entirety, we ask that it be enjoined at least insofar as it relates to export and import rates between New Orleans and points west of the Mississippi River. The vast structure of domestic rates in the area between the Rocky and Allegheny Mountains need not be disturbed in

order to afford the Texas ports the protection they feel sure they are entitled to under Sec. 3(1) of the Interstate Commerce Act as to export and import rates.

Respectfully submitted,

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January 29, 1951.

Certificates.

Counsel hereby certify that this petition is presented in good faith and not for delay.

PRICE DANIEL,

WM. A. DISQUE.

I hereby certify that I have today served a copy of this petition on counsel for all parties of record in these proceedings by first-class mail.

WM. A. DISQUE.

January 29, 1951.

APPENDIX.

The following is a copy of what was said on the floor of the Constitutional Convention on Saturday, August 25, 1787, respecting discriminations against States in the Matter of port treatment. It is taken from Pages 478 and 479 of Elliott's Debates on the Federal Constitution:

Mr. CARROLL and Mr. L. MARTIN expressed their apprehensions, and the probable apprehensions of their constituents, that under the power of regulating trade the General Legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat; as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, etc. They moved the following proposition:

> "The Legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one State in preference to another."

Mr. GORHAM thought such a precaution unnecessary; and that the revenue might be defeated, if vessels could run up long rivers, through the jurisdiction of different States without being required to enter, with the opportunity of landing and selling their cargoes by the way.

Mr. MCHENRY and Gen. PINCKNEY made the following propositions:

> "Should it be judged expedient by the Legislature of the United States, that one or more ports for collecting duties or imposts, other than those ports of entrance and clearance already established by the respective States, should be established, the Legislature of the United States shall signify the same to the Executives of the respective States ascertaining the

number of such ports judged necessary, to be laid by the said Executives before the Legislatures of the States at their next session; and the Legislatures of the United States shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any State, except the Legislature of such State shall neglect to fix and establish the same during their first session to be held after such notification by the Legislature of the United States to the Executive of such State.

"All duties, imposts and excise, prohibitions or restraints, laid or made by the Legislature of the United States, shall be uniform and equal throughout the United States."

These several propositions were referred, *nem. con.*, to a committee composed of a member from each State. The Committee appointed by ballot, were Mr. LANGDON, Mr. GORHAM, Mr. SHERMAN, Mr. DAYTON, Mr. FITZSIMONS, Mr. READ, Mr. CARROLL, Mr. MASON, Mr. WILLIAMSON, Mr. BUTLER, Mr. FEW.